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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, Plaintiff,

v.

STATE OF MAINE, ET AL., Defendants.

APPENDIX TO EXCEPTIONS AND BRIEF OF THE COMMON COUNSEL STATES
VOLUME II - EXHIBITS

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TABLE OF CONTENTS

APPENDIX TO EXCEPTIONS AND BRIEF OF THE COMMON COUNSEL STATES

VOLUME II – EXHIBITS

	Page
List of Exhibits Submitted by the Common Counsel States	559
Maine et al. Ex. No. 2	641
Maine et al. Ex. No. 12	642
Maine et al. Ex. No. 13	644
Maine et al. Ex. No. 141	645
Maine et al. Ex. No. 170	646
Maine et al. Ex. No. 172	647
Maine et al. Ex. No. 174	648
Maine et al. Ex. No. 175	649
Maine et al. Ex. No. 176	650
Maine et al. Ex. No. 182	655
Maine et al. Ex. No. 183	656
Maine et al. Ex. No. 184	656
Maine et al. Ex. No. 185	657
Maine et al. Ex. No. 186	658
Maine et al. Ex. No. 189	659
Maine et al. Ex. No. 190	661
Maine et al. Ex. No. 196	663

Page

Exhibits (cont'd):

Maine et al. Ex. No. 197 663

Maine et al. Ex. No. 198 664

Maine et al. Ex. No. 199 665

Maine et al. Ex. No. 202 668

Maine et al. Ex. No. 204 670

Maine et al. Ex. No. 207 672

Maine et al. Ex. No. 209 673

Maine et al. Ex. No. 211 674

Maine et al. Ex. No. 212 675

Maine et al. Ex. No. 221 675

Maine et al. Ex. No. 223 677

Maine et al. Ex. No. 237 678

Maine et al. Ex. No. 270 679

Maine et al. Ex. No. 276 680

Maine et al. Ex. No. 277 682

Maine et al. Ex. No. 280 682

Maine et al. Ex. No. 283 683

Maine et al. Ex. No. 326 684

Maine et al. Ex. No. 336 685

Maine et al. Ex. No. 445 687

Maine et al. Ex. No. 449 689

Maine et al. Ex. No. 451 692

Page

Exhibits (cont'd):

Maine et al. Ex. No. 458 693

Maine et al. Ex. No. 461 694

Maine et al. Ex. No. 469 695

Maine et al. Ex. No. 473 702

Maine et al. Ex. No. 476 703

Maine et al. Ex. No. 481 704

Maine et al. Ex. No. 491 705

Maine et al. Ex. No. 499 706

Maine et al. Ex. No. 503 709

Maine et al. Ex. No. 554 710

Maine et al. Ex. No. 565 712

Maine et al. Ex. No. 566 714

Maine et al. Ex. No. 570 716

Maine et al. Ex. No. 604 717

Maine et al. Ex. No. 609 721

Maine et al. Ex. No. 621 721

Maine et al. Ex. No. 622 725

Maine et al. Ex. No. 623 726

Maine et al. Ex. No. 624 727

Maine et al. Ex. No. 625 728

Maine et al. Ex. No. 626 730

Maine et al. Ex. No. 627 731

Page

Exhibits (cont'd):

Maine et al. Ex. No. 628 734
Maine et al. Ex. No. 629 737
Maine et al. Ex. No. 635 739
Maine et al. Ex. No. 637 741
Maine et al. Ex. No. 657 745
Maine et al. Ex. No. 667 746
Maine et al. Ex. No. 668 749
Maine et al. Ex. No. 673 766
Maine et al. Ex. No. 675 771
Maine et al. Ex. No. 676 776
Maine et al. Ex. No. 679 777
Maine et al. Ex. No. 680 777
Maine et al. Ex. No. 683 783
Maine et al. Ex. No. 690 791
Maine et al. Ex. No. 693 818
Maine et al. Ex. No. 712 821
Maine et al. Ex. No. 716 823
Maine et al. Ex. No. 718 824
Maine et al. Ex. No. 719 828
Maine et al. Ex. No. 720 831
Maine et al. Ex. No. 721 849
Maine et al. Ex. No. 722 850

Page

Exhibits (cont'd):

Maine et al. Ex. No. 726 850
Maine et al. Ex. No. 728 855
Maine et al. Ex. No. 729 865
Maine et al. Ex. No. 730 872
Maine et al. Ex. No. 731 875
Maine et al. Ex. No. 732 877
Maine et al. Ex. No. 734 879
Maine et al. Ex. No. 739 880
Maine et al. Ex. No. 742 881
Maine et al. Ex. No. 743 889
Maine et al. Ex. No. 747 890
Maine et al. Ex. No. 751 893
Maine et al. Ex. No. 762 894
Maine et al. Ex. No. 768 903
U.S. Ex. No. 4 905
U.S. Ex. No. 8 905
U.S. Ex. No. 11 991
U.S. Ex. No. 72 1001
U.S. Ex. No. 73 1003
U.S. Ex. No. 334 1006

LIST OF EXHIBITS SUBMITTED BY COMMON COUNSEL STATES

1. Petition for Charter of New England (1620), in *Collections of the Maine Historical Society Library*, 1 *Farnham Papers* 15-18.

2. Charter of Maine to Gorges and Mason (1622), in 3 Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming The United States of America* 1621 (1909) [hereinafter "Thorpe"].

3. Grant of Province of Maine (1639), in 3 Thorpe 1625.

4. Charter of Maine to Massachusetts Bay (1691).

5. Deed from Ferdinando Gorges to John Usher (1678), in II *Collections of Maine Historical Society* 657-60.

6. Deed from John Usher to Massachusetts Bay (1678), in II *Collections of Maine Historical Society* 661-64.

7. Act of United States Congress, March 3, 1820.

8. Maine Revised Statutes of 1916, Ch. 133, Sec. 3.

9. Maine Revised Statutes of 1930, Ch. 143, Sec. 3.

10. 1 Maine Revised Statutes Annotated, Secs. 1-5.

11. Charter of New England (1620), in 3 Thorpe 1827.

12. Grant of "Mariana" to Mason (1621), in XXIX *New Hampshire State Papers* 19 (Albert S. Batchellor, ed., Concord, N. H. 1896).

13. Grant of New Hampshire to Mason (1629), in 4 Thorpe 2433.

14. Grant of "Laconia" to Gorges and Mason (1629), in XXIX *New Hampshire State Papers* 33.

15. Hilton or Squamscott Patent (1629), in XXV *New Hampshire State Papers* 698 (Albert S. Batchellor, ed., Concord, N. H. 1895).

16. Grant of "Piscataway" to Gorges, Mason, *et al.* (1631), in XXIX *New Hampshire State Papers* 39.

17. Grant of New Hampshire to Wollaston (1635), in 4 Thorpe 2437.

18. Grant of New Hampshire (under name of "Masonia") to Mason (1635), in 4 Thorpe 2441.

19. Grant of New Hampshire to Mason (1635), in 4 Thorpe 2443.

20. Grant of New Hampshire from Wollaston to Mason (1635), in 4 Thorpe 2439.

21. Agreement of Settlers at Exeter (1639), in 4 Thorpe 2445.

22. Combination of Piscataqua River Inhabitants (1641), in 4 Thorpe 2445.

23. Petitions of Dover and Portsmouth, and Act of Union with Massachusetts (1641), in 1 *Laws of New Hampshire* xxx (Albert S. Batchellor, ed., Manchester, N. H. 1904).

24. Charter of Massachusetts Bay (1629), in 3 Thorpe 1846.

25. Commission of Cutt (1680), in 4 Thorpe 2446.

26. Commission of Cranfield (1682), in 1 *Laws of New Hampshire* 48.

27. Commission of Dudley (1685), in 1 *Laws of New Hampshire* 93.

28. First Commission of Andros (1686), in 1 *Laws of New Hampshire* 144.

29. Second Commission of Andros (1688), in 3 Thorpe 1863.

30. Commission of Allen (1692), in 1 *Laws of New Hampshire* 501.

31. Commission of Earl of Bellomont (1699), in 1 *Laws of New Hampshire* 607.

32. Commission of Dudley (1702), in 2 *Laws of New Hampshire* 4 (Albert S. Batchellor, ed., Concord, N. H. 1913).

33. Commission of Shute (1716), in 2 *Laws of New Hampshire* 210.

34. Commission of Burnet (1728), in 2 *Laws of New Hampshire* 410.

35. Commission of Belcher (1729), in 2 *Laws of New Hampshire* 459.

36. Commission of Benning Wentworth (1741), in 2 *Laws of New Hampshire* 600.

37. Commission of John Wentworth (1766), in 3 *Laws of New Hampshire* 411 (Henry H. Metcalf, ed., Bristol, N. H. 1915).

38. Constitution of New Hampshire (1776), in 4 Thorpe 2451.

39. An Act for the Re-establishing the General System of Laws Heretofore in Force in this State (1777), in 4

Laws of New Hampshire 87 (Henry H. Metcalf, ed., Bristol, N. H. 1916).

40. Constitution of New Hampshire (1784), in 4 Thorpe 2453.

41. First Charter of Virginia (1606), in 7 Thorpe 3783.

42. Second Charter of Virginia (1609), in 7 Thorpe 3790.

43. Third Charter of Virginia (1612), in 7 Thorpe 3802.

44. Charter of Massachusetts Bay (1691), in 3 Thorpe 1870.

45. Grant to Sir Henry Roswell (1629).

46. Deed by Grandson of Ferdinando Gorges to the Governor and Company of Massachusetts (1667).

47. 1760 Acts and Laws of Massachusetts, Ch. 11, at 523-26.

48. Act of Massachusetts of June 25, 1789.

49. Massachusetts Laws of 1789, at 27.

50. Plymouth Colony Laws, Pt. I, at 96-97.

51. Plymouth Colony Laws, Pt. II, at 203.

52. Plymouth Colony Laws, Pt. II, at 282.

53. Plymouth Colony Laws, Pt. II, at 283-84.

54. Massachusetts Province Laws, 1692-93, Ch. 32, Act of November 26, 1692, Secs. 1, 2.

55. Massachusetts Province Laws, 1702, Ch. 12, Act of November 21, 1702.

56. 1760 Acts and Laws of Massachusetts, Ch. II, at 523-26.

57. Massachusetts Laws (1789) at 27.

58. Massachusetts Acts (1859), Ch. 289, Gen. Stats. 1860, Ch. 1.

59. Massachusetts Acts (1881), Ch. 196, at 518.

60. Massachusetts Pub. Stats. 1882, Ch. 27, Sec. 2.

61. Massachusetts Rev. Laws, Ch. 25, Sec. 1.

62. Massachusetts Gen. Laws 1921, Ch. 425, Sec. 1.

63. Laws of Massachusetts 1812, Ch. 27.

64. VI Laws of Massachusetts 1812-1813, at 39 (approved June 22, 1812).

65. Laws of the Commonwealth of Massachusetts, March 1822, Ch. 97, at 712 (passed Feb. 22, 1822).

66. Charter of the Dutch West India Company (1621), in 1 Thorpe 59.

67. Grant of Province of Maine to Duke of York (1664), in 3 Thorpe 1637.

68. Grant of Province of Maine to Duke of York (1674), in 3 Thorpe 1641.

69. Duke of York's Release to John Lord Berkeley and Sir George Carteret (1664), in 5 Thorpe 2533.

70. Concession and Agreement of the Lords Proprietors (1664), in 5 Thorpe 2535.

71. Declaration of True Intent and Meaning of Lord Proprietors (1672), in 5 Thorpe 2544.

72. Grant to the Lords Proprietors, Sir George Carteret (1674), in 5 Thorpe 2546.

73. Charter or Fundamental Laws of West New Jersey (1676), in 5 Thorpe at 2548.

74. Quintipartite Deed of Revision, between East and West Jersey (1676), in 5 Thorpe 2551.

75. Duke of York's Confirmation to the 24 Proprietors (1682), in 5 Thorpe 2567.

76. The Fundamental Constitutions for the Province of East New Jersey (1683), in 5 Thorpe 2574.

77. The King's Letter Recognizing the Proprietors' Right to the Soil and Government (1683), in 5 Thorpe 2582.

78. Surrender from the Proprietors of East and West New Jersey (1702), in 5 Thorpe 2585.

79. The Queen's Acceptance of the Surrender of Government (1702), in 5 Thorpe 2584.

80. Instructions from Queen Anne to Lord Cornbury as Governor of New Jersey (1702), in II *Archives of the State of New Jersey, First Series* 506-36 (William A. Whitehead, ed., Daily Advertiser Printing House, Newark, N. J. 1881).

81. An Act for Regulating the Purchasing of Lands from the Indians, in *Laws of New Jersey 1703*, Ch. 1.

82. Instructions from King George II to Governor Lewis Morris (1738), in VI *Archives of the State of New Jersey, First Series* 15-51 (William A. Whitehead, ed., Daily Advertiser Printing House, Newark, N. J. 1882).

83. Certificate of Governor Morris Concerning the Proprietors' Surrender of the Government (1744), in VI *Archives of the State of New Jersey, First Series* 234-36.

84. Representation to His Majesty Concerning the Revival of the Bounties upon Hemp, [etc.] (1764), [from the Lords of Trade at Whitehall to King George III], in IX *Archives of the State of New Jersey, First Series* 405-24 (Frederick W. Record & William Nelson, eds., Daily Advertiser Printing House, Newark, N. J. 1885).

85. Budd, Thomas, *Good Order Established in Pennsylvania and New Jersey in America* (Gowans, N. Y. 1865).

86. Minutes of the Council of Safety of the State of New Jersey (John H. Lyon, printer, Jersey City, N. J. 1872).

87. An Act for the More Effectual Suppression of Piracy, 11 Gul. 3, c.7 (1700).

88. Wilson, Harold F., *The Jersey Shore, A Social and Economic History of the Counties of Atlantic, Cape May, Monmouth and Ocean* 153-76, 591-94 (Lewis Historical Pub. Co., New York 1953).

89. *Biographical Cyclopaedia of Ocean County, New Jersey* 24-61 (A. D. Smith & Co., Phila., Pa. 1899).

90. 3 Andrews, Charles M., *The Colonial Period of American History* 177-81 (Yale University Press, New Haven, Conn. 1937).

91. Heston, Alfred M., *Absegami: Annals of Eyren Haven and Atlantic City, 1609 to 1904*, at 103 (Atlantic City, N. J. 1904).

92. A Mapp of New Jersey in America by John Seller and William Fisher, London, 1677.

93. *A Mapp of New Jersey in America by John Seller and William Fisher, London, 1677, A Note on the*

Facsimile Issued by The John Carter Brown Library, Brown University, Providence, Rhode Island (1958).

94. New Jersey Constitution of 1776, art. XXII.

95. Charter for the Province of Pennsylvania (1681), in 5 Thorpe 3035.

96. Charter of King of Sweden to Swedish South Company (1626), in XII *Documents Relating to the History of the Dutch and Swedish Settlements on the Delaware River* 7 (Fernow, ed., Argus Co., Albany, N. Y. 1877) [hereinafter "*History of Dutch and Swedish Settlements*"].

97. General Charter for Those Who Discover New Passages (1614), in *Documents Relative to the Colonial History of New York* [etc.] 5 (Brodhead, ed., Weed, Parsons & Co., Albany, N. Y. 1856) [hereinafter "*Colonial History of New York*"].

98. Grant of Exclusive Trade to New Netherland (1614), in *Colonial History of New York* 11.

99. Deed Transferring to the Burgomasters of Amsterdam All the Country on the Delaware, in *History of Dutch and Swedish Settlements* 449.

100. Resolution of the States General Respecting Newly-Discovered Countries (1614), in *Colonial History of New York* 5.

101. Bargain and Sale of the South Tract (1682), Exhibit No. 524, *New Jersey* v. *Delaware,* U.S. Supreme Court No. 13 Original (original in Delaware Archives).

102. Charter of Charles II to Duke of York (1682), Exhibit No. 529, *New Jersey v. Delaware.*

103. Delaware Constitution of 1776, art. 25.

104. Delaware Constitution of 1776, art. 12.

105. 29 Del. Code Sec. 301 (1953).

106. 23 Del. Code Sec. 2112 (1968 Cum. Pocket Part).

107. I Del. Laws, Ch. 68a, at 175-79.

108. I Del. Laws, Ch. 66a, at 166-73.

109. II Del. Laws, Ch. 91b, at 770 (1782).

110. II Del. Laws, Ch. 128b, at 831-37 (1786).

111. II Del. Laws, Ch. 194b, at 942-44 (1789).

112. II Del. Laws, Ch. 134c, at 1354-58 (1797).

113. Del. Enrolled Bills 1776-79, at 185 (1778).

114. Del. Enrolled Bills 1776-79, at 204 (1778).

115. Del. Enrolled Bills 1780-84, at 64.

116. Del. Enrolled Bills 1780-84, at 80 (1780).

117. Del. Enrolled Bills 1780-84, at 275-76 (1782).

118. III Del. Laws, Ch. 42, at 82-106 (1799).

119. V Del. Laws, Ch. 222, at 395-97 (1819).

120. VII Del. Laws, Ch. 50, at 120-33 (1827).

121. VIII Del. Laws, Ch. 69, at 74-75 (1831).

122. IX Del. Laws, Ch. 316, at 365 (1841).

123. IX Del. Laws, Ch. 303, at 340 (1841).

124. X Del. Laws, Ch. 75, at 67-68 (1845).

125. X Del. Laws, Ch. 569, at 562-67 (1851).

126. XI Del. Laws, Ch. 392, at 436-37 (1857).

127. XIII Del. Laws, Ch. 547, at 649-50 (1869).

128. XIV Del. Laws, Ch. 421, at 401-07 (1873).

129. XIV Del. Laws, Ch. 356, at 324 (1873).

130. XIV Del. Laws, Ch. 171, at 247-48 (1871).

131. XV Del. Laws, Ch. 384, at 448-50 (1877).

132. Charter to William Penn and Laws of the Province of Pennsylvania 53 (Pennsylvania State Printer 1879).

133. Charter to William Penn and Laws of the Province of Pennsylvania 284-85.

134. Delaware Senate Bill No. 53 (1939) (copy on microfilm in Delaware State Archives).

135. Instructions of Queen Christina for Gov. Printz (1642), in Johnson, Amandus, *Instructions for Governor Printz* 62-98 (Swedish Colonial Society, Phila., Pa. 1930).

136. Freedoms and Exemptions for New Netherland (1640), in *Colonial History of New York* 119-23.

137. Resolutions, Letters and Charters concerning proposed Dutch expedition against the Swedes on the Delaware (1655), in *History of Dutch and Swedish Settlements* 96-97.

138. Instructions for Ensign Dirck Smith and Pieter Lourensen (1660), in *History of Dutch and Swedish Settlements* 323.

139. Letters Patent to Sir Humfrey Gylberte (1578), in 1 Thorpe 49.

140. Charter to Sir Walter Raleigh (1584), in 1 Thorpe 53.

141. Proprietary Charter and Grant to Caecilius Calvert, Lord Baltimore (1632), in 3 Thorpe 1677.

142. Constitution of Maryland, art. 5 (1867).

143. Constitution of Virginia of 1776, art. XXI, in I *Hening's Statutes at Large*, Sec. 4, at 56.

144. Code of Virginia of 1849, Tit. 1, Ch. 1, Secs. 1-13.

145. Code of Virginia of 1849, Tit. 9, Ch. 16, Secs. 1-2.

146. Code of Virginia of 1887, Tit. 2, Ch. 2, Sec. 2.

147. Code of Virginia of 1887, Tit. 3, Ch. 3, Secs. 8-14.

148. Code of Virginia of 1919, Tit. 2, Ch. 2, Sec. 2.

149. Code of Virginia of 1919, Tit. 3, Ch. 3, Secs. 9-16.

150. Code of Virginia of 1950, Tit. 1, Ch. 2, Secs. 1-10.

151. Code of Virginia of 1950, Tit. 7, Ch. 1, Secs. 7-1 through 7-9.

152. Code of Virginia of 1950, as amended, Tit. 1, Ch. 2, Sec. 1-10.

153. Code of Virginia of 1950, Tit. 7.1, Ch. 1, Secs. 7.1-1 through 7.1-10.

154. Code of Virginia of 1950, Supplement, at 234-38.

155. Patent for Providence Plantations (1643), in 6 Thorpe 3209.

156. Charter of Rhode Island and Providence Plantations (1663), in 6 Thorpe 3211.

157. *The Case of the Royal Fishery of the Banne* (1610), translated in Angell, Joseph K., *A Treatise on the Right of Property in Tide Waters*, pp. 35-42 (1826).

158. *Attorney General* v. *Sir Edward Turner* [Farmer] 2 Mod. p. 106 (1676).

159. *Attorney General* v. *Farmer*, 2 Lev. p. 171 (1676).

160. *Queen* v. *Keyn*, L.R. 2 Exch. Div. p. 63 (1876).

161. *Harris* v. *The Hamburg-Amerikanische Packetfahrt Actiengesellschaft*, 2 C.P.D. 173 (1877).

162. *Lord Advocate* v. *Clyde Navigation Trustees*, 19 Rettie p. 174, at pp. 176-79 (1891).

163. *Lord Advocate* v. *Wemyss*, A.C. p. 48, at pp. 66-67 (1900).

164. *Fitzhardinge* v. *Purcell*, 2 Ch. p. 139, at pp. 165-67 (1908).

165. *Secretary of State for India* v. *Chelikani Rama Rao*, L.R. 43 Indian Appeals pp. 192-99 (1916).

166. "Cornwall Submarine Mines Act," 21 & 22 Vict. c. 109 (1858).

167. Re: Cornwall Submarine Mines Act Parliamentary Papers (314) XLVII, pp. 20-21 (1857-58).

168. Re: Cornwall Submarine Mines Act Parliamentary Papers (399) XIVII, 245 (1857-58).

169. Re: Cornwall Submarine Mines Act, 151 Parl. Deb. (3rd ses.), pp. 882, 1242-43, 1505, 1652-54, 1750-54, 2077-78.

170. "Territorial Waters Jurisdiction Act," 41 & 42 Vict. c. 73 (1878).

171. 4 Bacon, Mathew, *A New Abridgement of the Law*, pp. 156-57 (1759).

172. Baker, Sir Sherston, *The Office of Vice-Admiral of the Coast*, pp. 29-40, 123-26 (1884).

173. 1 *Black Book of Admiralty*, pp. 255-58.

174. 2 Blackstone, Sir William, *Commentaries on the Laws of England*, Vol. 2, pp. 261-62 (1765).

175. Boroughs, Sir John, *The Soveraignty of the British Seas*, pp. 43-47, 89-93 (1633) (1920 ed.).

176. "De Superiorite Maris Angliae & jure offici Admirallatus in eodem," translated in Boroughs, Sir John, *The Soveraignty of the British Seas*, p. 55 (1633) (1921 ed.).

177. "De Superiorite Maris Angliae & jure offici Admirallatus in eodem," translated in Boroughs, Sir John, *The Soveraignty of the British Seas*, p. 28 (1633) (1651 ed.).

178. Callis, Robert, *Lectures on the Statute of Sewers*, pp. 16-23 (delivered 1622, London) (1647 ed.).

179. Carr, Cecil T., *Select Charters of Trading Companies*, pp. 51-62, 196-203, 228-30 (1913).

180. Chalmers, *Opinions of Eminent English Lawyers*, pp. 523-27.

181. Codrington, Robert, *His Majesties Propriety and Dominion on the British Seas Asserted*, pp. 1-3 (London 1665).

182. Coke, Edward, *The First Part of the Institutes of the Lawes of England*, pp. 260b-261a, sec. 439 (London 1628).

183. Coke, Edward, *The Fourth Part of the Institutes of the Lawes of England*, pp. 134-37, 142-45 (London 1644).

184. Coke, Sir John, "*Propositions for Fishing*" (Manuscript) (1633) (first page only).

185. 4 Comyns, *Digest of The Laws of England* (1776 ed.).

186. Elder, John Rawson, *The Royal Fishery Companies of the Seventeenth Century*, pp. 4-12, 17-19, 25-26, 70-73, 85-86 (1912).

187. Exton, John, *The Maritime Dicaeologie or Sea-Jurisdiction of England*, pp. 21-24 (London 1664).

188. Fenn, Percy Thomas, Jr., *The Origins of the Right of Fishery in Territorial Waters*, pp. 194-96 (1926).

189. Fulton, Thomas Wemyss, *The Sovereignty of the Sea*, pp. 366-75, 514-15, 543 (1911).

190. Galloway, Robert L., *A History of Coal Mining in Great Britain*, pp. 54-57, 94-97 (London 1882).

191. Godolphin, John, *A View of the Admiral Jurisdiction*, pp. 26-31 (1661) (2d ed. 1685).

192. 7 Hakluyt, Richard, *The Principal Navigations, Voyages, Traffiques and Discoveries of the English Nation*, pp. 374-81 (Glasgow 1903).

193. 8 Hakluyt, Richard, *The Principal Navigations, Voyages, Traffiques and Discoveries of the English Nation*, pp. 16-23 (Glasgow 1903).

194. 1 Hargrave, *A Collection of Tracts Relative to the Law of England*, containing Sir Mathew Hale, "De Jure Maris," pp. 10-44 (1787).

195. Hay, Daniel, *Whitehaven, A Short History*, pp. 14-17, 20-23, 48-49 (Whitehaven 1966).

196. Hull, Edward, *The Coal Fields of Great Britain*, pp. 34-35 (London 1881).

197. Malynes, Gerard, *Lex Mercatoria or the Ancient Law-Merchant*, pp. 185-209 (London 1622).

198. 1 Marsden, Reginald, ed., *Documents Relating to Law and Custom of the Sea*, pp. 84-89.

199. 2 Marsden, Reginald, *Documents Relating to Law and Custom of the Sea*, pp. 231-33 (1915-1916).

200. 1 Marsden, *Select Pleas in the Court of Admiralty*, pp. xiv-xv, xlvi-xlvii.

201. 2 Marsden, *Select Pleas in the Court of Admiralty*, pp. 174a-174b (London 1897).

202. Medows, Sir Philip, *Observations Concerning the Dominion and Sovereignty of the Seas*, pp. 7-10, 41-45 (London 1689).

203. Moore, Stuart A., *A History of the Foreshore and The Law Relating Thereto with a Hitherto Unpublished Treatise By Lord Hale, Lord Hale's "De Jure Maris," and Hall's Essay on the Rights of the Crown in the Sea-shore*, (London 1888) (3rd. ed.).

204. Needham, Marchamont, *Of the Dominion or, Ownership of the Sea*, pp. 1-4, 181-190, 140-143 (translation of John Selden, *Mare Clausum*) (London 1652).

205. Poore, Benjamin Perley, *The Federal and State Constitutions, Colonial Charters, and Other Organic Law of the United States*, pp. 1379-82 (Washington, D. C. 1877).

206. 2 Rolle, Henry, *Un abridgement Des Plusiers Cases et Resolutions Del common Ley*, pp. 168-70 (London 1668).

207. Spelman, Sir Henry, *The English Works of Sir Henry Spelman*, pp. 226-29 (Edmund Getson ed., 1723).

208. 16 Viner, Charles, *A General abridgment of Law and Equity*, pp. 576-77 (1742).

209. Welwood, William, *An Abridgment of all Sea-Lawes*, pp. 67-72 (1613 ed.) (London 1590).

210. 1 Wynne, William, *The Life of Sir Leoline Jenkins*, pp. xcvi-xcvii, xc-xci (1724).

211. 2 Wynne, William, *The Life of Sir Leoline Jenkins*, pp. 698-99, 708-09, 774 (1724).

212. Zouch, Richard, *The Jurisdiction of the Admiralty of England Asserted*, pp. 16-23, 38-40 (London 1663).

213. S.P. Dom., Eliz. CCLXVIII, p. 115.

214. *Patent Rolls*, 13 Eliz., pt. ix, p. 297.

215. S.P. Dom., Jac. I, vol. 11, p. 531 (1623-1625).

216. S.P. Dom., Jac. I, LXXXVIII, p. 381 (1616).

217. S.P. Dom., Jac. I, CXLVII, p. 625 (1623).

218. S.P. Dom., Car. I, CCCCXXIX, p. 534 (1639).

219. 1 *Col. Treas. Paper*, pp. 383, 537-38 (1696).

220. 2 *Col. Treas. Papers*, pp. 233-34 (1697-98).

221. A Booke of Proclamations, &c., p. 148 (1609).

222. *A Proclamation for Restraint of Fishing Upon His Majesties Seas and Coast without License* (1636) (Houghton Library (Rare Books) Harv. Univ.).

223. S.P. Dom., Car. I, CCCXIII, p. 210 (1635-36).

224. S.P. Dom., Commonwealth, pp. 484-85 (1649-50).

225. *By The King: A Proclamation* (London 1683) (Houghton Library (Rare Books) Harv. Univ.).

226. 4 *Col. Treas. Books*, p. 633 (1674).

227. S.P. Dom., Car. II, p. 541 (1675).

228. S.P. Dom., Jac. I, CXI, p. 97 (1619).

229. S.P. Dom., Car. I, XXV, p. 313 (1626).

230. S.P. Dom., Car. I, XCI, p. 536 (1628).

231. S.P. Dom., Car. I, CCCXXCIII, p. 527 (1638).

232. 8 *Col. Treas. Books*, pp. 1231-32 (1686-87).

233. S.P. Col. #83, p. 113 (1629-30).

234. S.P. Dom., Car. I, CCCXLIV, p. 371 (1636-37).

235. S.P. Col. #32, p. 86 (1626-28).

236. S.P. Col. Add. (America & W. Indies) #28, p. 22, #29, p. 23 (1574-1674).

237. 1 Acts of Privy Council (Col.) #65, pp. 40-41.

238. S.P. Col. Add. (America and W. Indies) #48 & #49, pp. 32-36 (1574-1674).

239. The First Letters Patent Granted to John Cabot and his Sons, 5 March 1496; J. A. Williamson, *The Cabot Voyages and Bristol Discovery under Henry VII* 204-05 (1962).

240. *Calendar of State Papers, Colonial, 1661-1668* (hereinafter "*CSP, Col.*"), Section Nos. 275, 340, 431, 509, 510, 511, 622, 1599, 1600.

241. Letters Patent Granted to Richard Warde and Others, 19 March 1501; J. A. Williamson, *The Cabot Voyages and Bristol Discovery under Henry VII* 236-47 (1962).

242. Letters Patent Granted to Hugh Elyot and Others, 9 December 1502; J. A. Williamson, *The Cabot Voyages and Bristol Discovery under Henry VII* 250-61 (1962).

243. *Calvin's Case,* 7 Coke Rep. 2a, 77 Eng. Rep. 379 (Exchequer Chamber, 1608).

244. *Calvin's Case,* Moore (K. B.), 790, 72 Eng. Rep. 908 (consisting of earlier arguments on the same set of facts).

245. Speech of Lord Bacon, as Counsel for Calvin, in the Exchequer Chamber; 2 Howell, *State Trials* 575-606.

246. *Campbell v. Hall,* 1 Cowp. 204, 98 Eng. Rep. 1045 (K. B. 1774).

247. *Campbell v. Hall,* Lofft, 655, 98 Eng. Rep. 848.

248. *CSP, Col., 1677-1680,* Section Nos. 342, 343, 356, 587, 1045, 1058, 1137, 1323, 1346, 1347, 1403, 1405, 1409, 1565, 1571, 1599.

249. *Craw v. Ramsey,* Vaughan, 274, 124 Eng. Rep. 1072 (C. P. 1670).

250. *Concerning Process Out of the Courts at Westminster into Wales of Late Times, and How Anciently,* Vaughan, 395, 124 Eng. Rep. 1130.

251. Charles M. Andrews, 1 *The Colonial Period of American History* 82-84 (1934).

252. Wesley Frank Craven, "An Introduction to the History of Bermuda," 17 *William and Mary Quarterly* 190-195 (2nd series 1937).

253. *CSP, Col., 1689-1692,* Section Nos. 289, 1026, 1028, 1276, 1297, 1440, 1443, 1570, 1571, 1572, 1573, 1574, 1596, 1606, 1650, 1665, 1669, 1670, 1724, 1731, 1737, 1738, 1744, 1745, 1753, 1756, 1758, 1759, 1760, 2467.

254. Robert Ludlow Fowler, "Organization of the Supreme Court of Judicature of the Province of New York," 19 *Albany Law Journal* 66, 68-69 (1879).

255. Duke of York's commission to Edmund Andros as Governor of New York, 1 July 1674; 3 *Documents Relative to the Colonial History of the State of New York* 215 (ed., E. B. O'Callaghan, 1855) (hereinafter *Doc. Rel. Col. Hist. N. Y.*).

256. Duke of York's commission to Colonel Thomas Dongan as Governor of New York, 30 September 1682; 3 *Doc. Rel. Col. Hist. N. Y.* 328.

257. Royal commission to Thomas Dongan as Governor of New York, 10 June 1686; 3 *Doc. Rel. Col. Hist. N. Y.* 377.

258. Draft of royal commission to Henry Sloughter as Governor of New York, 14 November 1689; 3 *Doc. Rel. Col. Hist. N. Y.* 623.

259. Royal commission to Benjamin Fletcher as Governor of New York, 18 March 1691/2; 3 *Doc. Rel. Col. Hist. N. Y.* 827.

260. Royal commission to the Earl of Bellomont as Governor of New York, 18 June 1697; 4 *Doc. Rel. Col. Hist. N. Y.* 266.

261. Royal commission to Robert Hunter as Governor of New York, 19 October 1709; 5 *Doc. Rel. Col. Hist. N. Y.* 92.

262. Royal commission to Robert Hunter as Governor of New York, 5 *Doc. Rel. Col. Hist. N. Y.* 391, 17 March 1714/5.

263. Royal commission to John Montgomerie as Governor of New York, 4 October 1727; 5 *Doc. Rel. Col. Hist. N. Y.* 834.

264. Royal commission to George Clinton as Governor of New York, 3 July 1741; *English Historical Documents: American Colonial Documents to 1776* at 195 (M. Jensen ed., 1964).

265. Duke of York's Second Grant to William Penn, Gawn Lawry, Nicholas Lucas, John Eldridge, Edmund Warner, and Edward Byllynge, For the Soil and Government of West New Jersey, August 6, 1680; 5 Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America* 2560 (1908) (hereinafter Thorpe).

266. Deeds of Enfeoffment from Duke of York to William Penn, August 24, 1682; Samuel Hazard, *Annals of Pennsylvania from the Discovery of the Delaware,* 1609-1682 at 587-593 (1850).

267. *CSP, Col., 1681-1685,* Section Nos. 227, 367, 1440, 1442.

268. *CSP, Col., 1675-1676,* Section Nos. 229, 563, 972, 976, 987, 989.

269. *CSP, Col., 1669-1674,* Section Nos. 270, 271, 1279.

270. *CSP, Col., 1700,* Nos. 368, 641.

271. Sir Robert Heath's Patent for Carolina and the Bahamas. 30 October 1629; 1 Thorpe 69.

272. Charter of Connecticut, April 23, 1662; 1 Thorpe 529.

273. Charter of Carolina, March 24, 1663; 5 Thorpe 2743.

274. Charter of Georgia, June 9, 1732; 2 Thorpe 765.

275. *CSP, Col., 1717-1718,* No. 176.

276. An Act to Entitle Garret De Graeuw and his Assigns to the Fishery of Porpoises during the Term of seven Years. 1 *Colonial Laws of New York* 839 (1894).

277. An act for Preserving of Oysters. 1 *Colonial Laws of New York* 845 (1894).

278. An Act for the Better Preservation of Oysters. 2 *Colonial Laws of New York* 655 (1894).

279. An Act to Revive an Act Intitled an Act For the better Preservation of Oysters and to give Power to make Sale of the Forfeitures therein Mentioned. 2 *Colonial Laws of New York* 950 (1894).

280. An Act for the Preservation of Oysters at and near Richmond County in this Colony. 2 *Colonial Laws of New York* 1067 (1894).

281. The Law About Whalers. S. George, *et al., Charter to William Penn and Laws of the Province of Pennsylvania 1682 to 1700,* at 241 (1879).

282. An Act for Preventing Frauds and Regulating Abuses in Trade. S. George, *et al., Charter to William Penn and Laws of the Province of Pennsylvania 1682 to 1700,* at 268-274 (1879).

283. Charter, Free Society of Traders. *Annals of Pennsylvania* 541-550 (Hazard, Samuel, ed., 1850).

284. Letter, William Penn to Lords of Admiralty, 10 December 1700. Historical Manuscripts Commission, *Manuscripts of the House of Lords, 1699-1702,* at 347-351, 17 n.s. pt. 4.

285. Letter, William Penn to C. Lawton, 10/10/1700 (December 10, 1700), 1 *Pennsylvania Archives,* First Series 139-142 (1852).

286. *CSP, Col., 1685-1688,* p. 334 of Section No. 1160 (March 1687 communication from Gov. Dongan of New York to Board of Trade and Plantations) and Section No. 1250.

287. *CSP, Col., 1693-1696,* Section Nos. 78, 551, 1930.

288. Leonard W. Labaree, 1 *Royal Instructions to British Colonial Governors, 1670-1776,* No. 659. (1935, reprinted 1967).

289. *Blankard v. Galdy,* 2 Salkeld 411, 91 Eng. Rep. 356 (K. B. 1693).

290. *Blankard v. Galdy,* 4 Mod. 221, 87 Eng. Rep. 359.

291. *Blankard v. Galdy,* Holt K. B., 342, 90 Eng. Rep. 1089.

292. *Blankard v. Galdy,* Comerbach, 228, 90 Eng. Rep. 445.

293. *Privy Council Memorandum,* 2 P. Wms. 75, 24 Eng. Rep. 646.

294. Proceedings and Acts of the General Assembly of Maryland (14), October, 1724-July, 1726, 35 *Archives of Maryland* 196-201, 296-301, 412-26, 496 (ed., C. C. Hall, 1915).

295. Daniel Dulany, "The Right of the Inhabitants of Maryland to the Benefit of the English Laws," St. George Leakin Sioussat, *The English Statutes in Maryland,* title page and pp. 81-104 Johns Hopkins University Studies in Historical and Political Science, Series XXI, Nos. 11-12 (Appendix 2, 1903).

296. *Dutton v. Howell,* Show. P. C. 24, 1 Eng. Rep. 17 (H. L. 1693/4).

297. Opinions of West, Board of Trade counsel, and crown law officers as to how far the king's subjects, who emigrate, carry with them the laws of England; 1 Chalmers, *Opinions of Eminent Lawyers on Various Points of English Jurisprudence* 194-95 (1814).

298. Opinion of Attorney General Northey relative to the clergy of Virginia; 1 Chalmers, *Opinions of Eminent Lawyers on Various Points of English Jurisprudence* 18-22 (1814).

299. Sir William Keith, A Short Discourse on the Present State of the Colonies in America with Respect to the Interest of Great Britain; 5 *Documents Relating to the Colonial History of the State of New Jersey, 1720-1737* at 224-225 (Archives of the State of New Jersey, 1st Series).

300. *CSP, Col., 1702,* No. 388.

301. *CSP, Col., 1702-1703,* No. 1356.

302. Proceedings and Acts of the General Assembly of Maryland (13), October 1720-July, 1723, 34 *Archives of Maryland* 440-42, 493, 601-03, 616-17, 661-79, 692-98 (ed., C. C. Hall, 1914).

303. The Opinion and Argument of the Chief Justice of the Province of New-York, concerning the Jurisdiction of the Supreme Court of the said Province, to determine Causes in a Course of Equity, 55 *Proceedings of the New Jersey Historical Society* 91-93 (1937).

304. *The Charge of the Honourable James DeLancey Esq., Chief Justice of the Province of New-York, to the Gentlemen of the Grand-Jury for the City and County of New-York, on Tuesday the 15th Day of January, Annoq; Domini, 1733* 3-4 (1733).

305. Lewis Morris to the Lords of Trade, 27 August 1733; 5 *Doc. Rel. Col. Hist. N. Y.* 951-55.

306. *Mr. Smith's Opinion Humbly Offered to the General Assembly of the Colony of New-York, on the Seventh of June, 1734, At Their Request* (1734), Title page, pp. 1-2, 11-15.

307. *Mr. Murray's Opinion Relating to the Courts of Justice in the Colony of New-York; Delivered to the General Assembly of the said Colony, at their Request, the 12th of June, 1734* 1-2, 4-8, 30-31 (1734).

308. *The Report of an Action of Assault Between Thomas Forsey, Plaintiff, and Waddel Cunningham, Defendant,* Title page and pp. 9-10, 17-20, 37-38, 56-58, 61-63.

309. An Act to Put in Force in This Province the Several Statutes of the Kingdom of England or South Britain, Therein Particularly Mentioned (1712); 2 *Statutes at*

Large of South Carolina 401-416 (ed., Thomas Cooper, 1837).

310. Newton D. Mereness, *Maryland as a Proprietary Province* 270-277 (1901).

311. Commissions of James DeLancey as Chief Justice of the Province of New York, 21 August 1733, and of Frederick Philipse as Second Justice of the Supreme Court of Judicature of the Province of New York of the same date; James Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger, Printer of the New York Weekly Journal* 50-52 (ed., Stanley N. Katz, 1963).

312. Commissions of Lewis Morris as Chief Justice of the Province of New York, September 1715, and of Thomas Jones as Justice of the Supreme Court of Judicature of the Province of New York, 29 September 1773; Julius Goebel, Jr. and T. Raymond Naughton, *Law Enforcement in Colonial New York: A Study in Criminal Procedure (1664-1776)* 48-49.

313. Commissions to Robert Hunter Morris as Chief Justice of New Jersey, 17 March 1738/9, and to Frederick Smyth as Chief Justice of New Jersey, 17 October 1764; 9 *Doc. Rel. Col. Hist. N. J.* 207-09, 475-78 (N. J. Archives, First Series, 1885).

314. 1 Paul M. Hamlin and Charles E. Baker, *Supreme Court of Judicature of the Province of New York, 1691-1704* 378-89, 408-412. (New York Historical Society Collections).

315. Thomas Pownall, *The Administration of the Colonies* 127-128 (4th ed., 1768).

316. 3 Baron Maseres, *The Canadian Freeholder: in Three Dialogues between an Englishman and a Frenchman, Settled in Canada,* 520-31 (1779).

317. Propositions offered by J. Duane to the Committee for Stating Rights, Grievances and the Means of Redress, First Continental Congress; 2 Crosskey, *Politics and the Constitution in the History of the United States* 1210-17 (1953).

318. The Declaration of Colonial Rights and Grievances; *English Historical Documents: American Colonial Documents to 1776,* at 805-08. (Ed., M. Jensen, 1964).

319. Constitution of Maryland, 1776, Article III; 3 Thorpe 1686-87.

320. Constitution of Massachusetts, 1780, Chapter VI, Article VI; 3 Thorpe 1910.

321. Constitution of New York, 1777, Article 35; 5 Thorpe 2635-36.

322. Ordinance to enable the present magistrates and officers to continue the administration of justice, etc., at a General Convention of Delegates and Representatives, from the several counties and corporations of Virginia, 6 May 1776, c. V, s. VI, 9 Hening, *Statutes at Large . . . Virginia* 126-128 (1821).

323. An Act for the Forfeiture and Sale of the Estates of Persons who have adhered to the Enemies of the State, and for declaring the Sovereignty of the People of this State, in respect to all Property within the same. Laws of New York, 1779, c. xxv, S. xiv. Passed 22 October 1779. *Laws of the Legislature of*

the State of New York, in Force Against the Loyalists, and Affecting the Trade of Great Britain, and British Merchants, and Others Having Property in That State 19 (1786).

324. Maryland Declaration of Rights, Article 3 (1776) at I *The Laws of Maryland* (Kelty ed., 1799).

325. An Act Against Striking sundry sorts of Fish within the Precincts of this Province, 29 *Archives of Maryland* 197-199.

326. An Act for the Preserving of Oysters in the Province of New-Jersey. *The Acts of the General Assembly of the Province of New-Jersey, From the Time of the Surrender of the Governments of the said Province, and the Fourth Year of the Reign of King George the Second,* 103-106 (1732).

327. Mitchell, Map of "The British Colonies of North America" (1755). Reproduction of copy belonging to King George III (copy obtained from American Heritage Publishing Company).

328. *The Territorial Papers of the United States* 3-12, 22-24, 172-173 (Carter ed., 1934) (hereinafter *Territorial Papers*).

329. *Territorial Papers* 3-8, 424-25 (1936).

330. *Territorial Papers* 18-22, 142-146 (1937).

331. Gaillard T. Lapsley, *The County Palatine of Durham,* A Study in Constitutional History 54-67 (1900).

332. Preamble to a body of acts passed at a Grand Assembly, Virginia, March 23, 1661/2; 2 Hening, *Statutes at Large . . . Virginia* 41-44 (1823).

333. Preface to Jefferson's Reports of Cases Determined in The General Court of Virginia, 1 *Virginia Reports Annotated* 5 (1903).

334. *CSP, Col., 1733,* No. 116.

335. *CSP, Col., 1737,* No. 288.

336. 12 Reports from Committees, Session 8 February – 15 August 1876, iii-iv, 166-67 (1876).

337. The Sea Fisheries (Ireland) Act, 1868, 31 and 32 Vict. c. 45, 1-7, 11-12.

338. Thomas Wemyss Fulton, *The Sovereignty of the Sea,* 696-699 (1911).

339. Mitchell, Map of "The British Colonies of North America" (1755). Reproduction of copy belonging to John Jay (copy obtained from Library of Congress).

340. Robert Percival, *An Account of the Island of Ceylon* 22, 60-63, 73 (1803).

341. James Steuart, *An Account of the Pearl Fisheries of Ceylon* 2, 7, 19, 28-29, 37-41, 43-44, 46, 76-78, 83-91, 99-103 (1843).

342. T. Southwell, "Report on Certain Scientific Work Done on the Ceylon Pearl Banks During the Year 1910," *Ceylon Marine Biological Reports* 191-192, 200-202 (Part V, 1911).

343. Donald K. Tressler and James McW. Lemon, Marine Products of Commerce, 108-111, 141-146, 733, 746-751 (2nd ed., rev. and enlarged 1951).

344. Clements R. Markham, "The Tinnevelly Pearl Fishery," 15 *Journal Soc. of Arts* 256-262 (1867).

345. George Federick Kunz and Charles Hugh Stevenson, *The Book of the Pearl,* 128-136, 143-144, 153-155, 213-217, 230-247 (1908).

346. Simmonds, "The Coral Fishery of the Mediterranean," 3 *The Technologist* 372 (London 1863).

347. Simmonds, "The Coral of Commerce," 2 *The Technologist* 20 (London 1862).

348. U.S. Dep't. of Commerce, Industrial Series No. 82, "World Trade in Sponges," by A. H. Stuart, 30-31, 43-83 (1948).

349. G. Bie Ravndal, "Sponge Fishing in the Levant," 87 *Scientific American* 67 (1902).

350. J. R. Leifchild, *Our Coal and Coal Pits* 132-3. (New impression 1968 from 2nd ed., 1856).

351. Sir Arthur Trueman, *The Coalfields of Great Britain* 316-319 (London 1954).

352. Robert L. Galloway, *A History of Coal Mining in Great Britain* 98-99 (reprint ed., 1969 of 1882 ed.).

353. D. B. Barton, *A History of Tin Mining and Smelting in Cornwall* Title page, 18, 36, 42, 68-69 and map (1967).

354. *CSP, Col., 1701,* Nos. 904, 916.

355. Hunter Miller, 3 *Treaties and other International Acts of the United States of America,* 319-356 (1937).

356. *Laws of the State of North Carolina* 17-19 (ed., J. Iredell, 1791).

357. Elizabeth G. Brown, *British Statutes in American Law, 1776-1836*, at 360-77 (1964).

358. 5 *Colonial Records of North Carolina* 81-82, 85-86 (1887).

359. 3 *Records of the Colony of Rhode Island and Province Plantations in New England*, 425 (1858).

360. *Laws and Acts of Her Majesties Colony of Rhode-Island and Providence Plantations Made from the First Settlement in 1636 to 1705*, 89-90 (photo-offset pages, 48 (printed text)).

361. *Acts and Laws of His Majesties Colony of Rhode Island and Providence – Plantations in America*, 45 (1719).

362. *Acts and Laws of His Majesty: Colony of Rhode-Island, and Providence Plantations in New-England in America*, 28 (1745).

363. *Acts and Laws of the English Colony of Rhode Island and Providence Plantations, in New England in America*, 55-61 (1767).

364. Proceedings and Acts of the General Assembly of Maryland July 1727-August 1729; 36 *Archives of Maryland* 81-82.

365. Proceedings and Acts of the General Assembly of Maryland, May 1730-August 1732; 37 *Archives of Maryland* 151-52, 518-20.

366. Francis W. Gray, "Mining Coal Under the Sea in Nova Scotia With Notes on Comparable Undersea Coal – Mining Operations Elsewhere, *Proceedings, Second (Triennial) Empire, Mining and Metallurgical Congress*, 1-9, 68-75 and 82-121 (Part II 1928).

367. Fur Seal Arbitration, Argument of the United States before the Tribunal of Arbitration convened at Paris under the Provisions of the Treaty Between the United States of America and Great Britain, Concluded February 29, 1892 at 233-37 (1893).

368. 62 *Columbia Law Review* 1123, 1124-1131 (1962).

369. Massachusetts Constitution of 1780, Part the First, Article IV, 10 *Annotated Laws of Massachusetts* 293 (1967).

370. Cession from the State of South Carolina; Donaldson, *The Public Domain, Its History, With Statistics* 75-76 (1884).

371. 3 *The Statutes at Large, from the First Year of King James the First to the Tenth Year of the Reign of King William the Third* 609-14 (1763).

372. Proposed Constitution of New Hampshire, 1779, IX *State Papers, New Hampshire* 837-842 (Bouton ed., 1875).

373. Second Commission of Governor Benning Wentworth, 1761, 3 *Laws of New Hampshire* 241-251 (Metcalf ed., 1915).

374. Proceedings of the Council of Maryland, 1687/8-1693, 8 *Archives of Maryland*, 400-01.

375. Agreement Between The Directors and The Chief Participants of the West Indian Company (1623), in Seymann, *Colonial Charters Patents and Grants to the Communities Comprising the City of New York* 128-141 (1939) [hereinafter "Seymann"].

376. Freedoms and Exemptions for New Netherlands (1640), in Seymann 164-172.

377. New York Const., art. 1, §14 (1962).

378. New York Laws of 1779, chap. 25, especially §XIV at p. 178.

379. New York Laws of 1786, chap. 67.

380. New York Rev. Stat., part II, chap. 1, tit. 1, §1 (1829).

381. New York Laws of 1835, chap. 232.

382. New York Laws of 1868, chap. 785.

383. New York Laws of 1899, chap. 712.

384. New York Laws of 1912, chap. 318, art. V, part X.

385. New York Laws of 1925, chap. 350.

386. New York State Law, art. 2, §7-a (1958).

387. Easement to United States of America, dated February 25, 1946, authorizing the installation of communication cables in the Atlantic Ocean from Rockaway Beach, Queens County, to Monmouth Beach, New Jersey; and accompanying drawing N.Y.D. C-328, Sheets 1 and 2.

388. Easement to Transcontinental Gas Pipe Line Corporation, dated April 26, 1967, authorizing a natural gas pipe line from Morgan, New Jersey, to land under water of the Atlantic Ocean, 500 feet more or less, offshore of the City of Long Beach, County of Nassau; and accompanying drawing No. G-2649, dated July 6, 1966, revised August 24, 1966.

389. Notice to Sergeant of Scituate concerning trial of Georgia Packet & Sloop Speedwell (1776).

390. Notice to Sergeant of North Providence concerning trial of Georgia Packet and Sloop Speedwell (1776).

391. Petition of owners of Sloop Speedwell (1776).

392. Judgment in admiralty concerning Georgia Packet (1776).

393. Notice to Sergeant of Gloucester regarding trial of Ship True Blue (1776).

394. Warrant to sell guns of True Blue (1776).

395. Notice to Sergeant of Providence to draw jurors to serve in prize cases against Rover (1776).

396. Judgment in admiralty concerning Brigantine Rover (1776).

397. Notice concerning capture of two British vessels (1776).

398. Notice to Sergeant of Scituate concerning capture and trial of various vessels (1776).

399. Judgment in admiralty concerning Ship Star and Garter (1776).

400. Notice by Jabez Whipple concerning capture of Brigantine Fanny (1776).

401. Notice by William Rhodes concerning capture of Brigantine Triton (1776).

402. Notice by Arthur Crawford concerning capture of Ship Thomas Bell (1776).

403. Interrogatories answered by James Watson (1776).

404. Interrogatories answered by Thomas Stacy (1776).

405. Interrogatories answered by Samuel Lightbourn (1776).

406. Interrogatories answered by Thomas Davis (1776).

407. Interrogatories answered by Holden Rhodes (1776).

408. Interrogatories answered by James Morris (1776).

409. Patent Appointing John Andrews, Esq., Judge of the Vice Admiralty Court of Rhode Island & Providence Plantations (1758).

410. Instructions to Stephen Hopkins, Esq., Governor of the Colony of Rhode Island to prosecute Samuel Parks and others of the Schooner Francis for piracy (1760).

411. Petition of Samuel Parks and Benjamin Hawkins, Prisoners Condemned for Piracy, Robbery & Felony (1760).

412. Instructions to be Observed by Captain James Allen, Commander of the Sloop Revenge of Newport in Pursuance of the Commission or Letter of Margue Given Him (1743); Extracts of Articles from the Treaty Marine with Holland concluded at London the First Day of December, 1674 A.D. (1744).

413. Resolution of the Rhode Island Council of War, MC-3, p. 101 (1777).

414. Resolution of the Rhode Island Council of War, MC-3, p. 107 (1777).

415. Resolution of the Rhode Island Council of War, MC-3, p. 117 (1777).

416. Resolution of the Committees of Safety, 12 *Rhode Island Acts & Resolves* 98 (1775).

417. An Act to Punish Persons Who Shall Pilot Any Armed Vessels In Or Out Of Any Of The Harbours, Rivers or Bays In This Colony Excepting Vessels Belonging To Some One of The British Colonies in America or To The Inhabitants Thereof, 12 *Rhode Island Acts & Resolves* 123 (1775).

418. Resolution concerning the building and equipping of Row Gallies for the Protection & Defense of the Colony, 12 *Rhode Island Acts & Resolves* 137 (1775).

419. Resolution concerning instructions to Ambrose Page, Esq., 12 *Rhode Island Acts & Resolves* 157 (1775).

420. Resolution concerning committee to audit naval officers' accounts, 12 *Rhode Island Acts & Resolves* 96 (1775).

421. An Act for punishment of persons holding correspondence with the enemy, 12 *Rhode Island Acts & Resolves* 153 (1775).

422. Resolution concerning monthly wages of Noraham Whipple, Capt. of Colony Sloop, 12 *Rhode Island Acts & Resolves* 130 (1775).

423. Resolution concerning purchase of Sloop Katy, 12 *Rhode Island Acts & Resolves* 169 (1775).

424. Resolution concerning the appointment of Captain John Grimes as commander of small sloop chartered by the Colony, 12 *Rhode Island Acts & Resolves* 107 (1775).

425. Resolution of Council of War, MC-3, p. 115 (1777).

426. Sloop Diamond Papers (1776).

427. Ship Aurora Papers (1777).

428. Petition and appeal of Province of Massachusetts Bay to King in Council, *Rhode Island & Massachusetts Boundary Documents (1734-1742)* 68-77.

429. An Act repealing an Act, entitled, "An Act for the more effectually securing to his Majesty the Allegiance of his subjects in this his Colony and Dominion of Rhode Island and Providence Plantations and altering the forms of Commissions of all Writs, Processes in Courts, etc., 9 *Rhode Island Colony Records,* 391-393.

430. Disbursements of Ship Aurora (1776).

431. Disbursements to cover expenses of Sloop Diamond (1777).

432. 12 *Rhode Island Acts and Resolves* 65 (1775).

433. 12 *Rhode Island Acts and Resolves* 112 (1775).

434. 12 *Rhode Island Acts and Resolves* 117 (1775).

435. 12 *Rhode Island Acts and Resolves* 119 (1775).

436. 12 *Rhode Island Acts and Resolves* 171 (1775).

437. 12 *Rhode Island Acts and Resolves* 77 (1775).

438. 12 *Rhode Island Acts and Resolves* 174 (1775).

439. Cession of Land with Fort and Light House in New Castle on Great Island, 1791, 5 *Laws of New Hampshire* 685-686 (Metcalf ed., 1916).

440. Cession of Further Land in New Castle on Great Island, 1807, 7 *Laws of New Hampshire* 604 (Bean ed., 1918).

441. Cession of White Island, Isle of Shoals, 1820, 8 *Laws of New Hampshire* 898-899 (Bean ed., 1920).

442. Cession of Sunken Rocks in Portsmouth Harbor, 9 *Laws of New Hampshire* 41-42 (Bean ed., 1921).

443. Morton J. Horwitz, Letter to Brice M. Clagett dated July 7, 1971.

444. Anon., "A Discourse Concerning the Fishery Within the British Seas and Other His Majesties Dominions" (1695) (Harvard Catalogue #F6642.30).

445. Joseph Chitty, Jr., *A Treatise on the Game Laws and on Fisheries* 239-243 (London, 1812).

446. Joseph Chitty, Jr., *A Treatise on the Law of the Prerogatives of the Crown* title page, 173 (London 1820).

447. Craig, *Jus Feudale,* lib. 1, Diegesis 13, p. 103 (1622) (1655 ed.).

448. Hargrave and Butler (eds.), *Coke on Littleton* 261a-261b (1823).

449. Robert G. Hall, *Essays on the Rights of the Crown* 1-7, 146-155 (1875 ed.).

450. Justice, *A General Treatise of the Dominion and Laws of the Sea* 1-11 (1705).

451. Henry Schultes, *An Essay On Aquatic Rights* 8-9, 109-110 (London 1811).

452. *The Abbott of Ramsay's Case,* Dyer 326b (1574).

453. *Benest* v. *Pipon,* 1 Knapp 60, 12 Eng. Rep. 243-48 (1829).

454. *Blundell* v. *Catterall*, 5 B & Ald. 268, 106 Eng. Rep. 1190-1207 (1821).

455. *Carter* v. *Murcot*, 4 Burr. 2162, 98 Eng. Rep. 127-129 (1768).

456. John Rawson Elder, *The Royal Fishery Companies of the Seventeenth Century* 35-53, 120-24, 127-31 (1912).

457. 1 Reginald Marsden, ed., *Documents Relating to Law and Custom of the Sea* 180, 184-88, 210-212, 427-29 (1915-1916).

458. 2 Reginald Marsden, ed., *Documents Relating to Law and Custom of the Sea* 86-88, 256-57, 263-64 (1915-1916).

459. "Proposal to the King and Both Houses of Parliament Respecting the Herring Fishery" 8 Lord Somer, *Tracts*, 477-79 (2d ed., 1812).

460. "England's Path to Wealth and Honour; in a Dialogue Between an Englishman and a Dutchman" (1700), 11 Lord Somer, *Tracts*, 371-74 (2d ed., 1812).

461. "The Advantages of the Fishery to Great Britain Demonstrated" 2-7, 16-19 (1719) (Fearing Collection, Harvard University).

462. "Britain's Golden Mines Discovered: or, The Fishery Trade Considered" 9-10, 20-21, 40-41, 51-52, 57-58, 70-71 (1720) (Fearing Collection, Harvard University).

463. "The Wealth of Great Britain in the Ocean" 4-5, 13, 22-24, 32-35, 60-71 (1749) (Fearing Collection, Harvard University).

464. "The Fisheries Revived: or, Britain's Hidden Treasure Discovered" 17, 34-38 (1750) (Fearing Collection, Harvard University).

465. Lounsbury, *The British Fishery at Newfoundland* 32-49.

466. 2 Baxter, *Gorges and Maine* 30-54.

467. 2 Mathew Hale, *The History of the Pleas of the Crown* 12-15 (1778).

468. Thomas W. Fulton, *The Sovereignty of the Sea* 99-105 (1911).

469. Pitman Potter, *The Freedom of the Seas in History, Law and Politics* 38-47 (1924).

470. "Petition of Samuel Mulford," 5 *Documents Relative to the Colonial History of the State of New York* (O'Callaghan ed.) title page, 474-475 (1855).

471. An Act to Prevent Trespasses on Certain Oyster Beds Therein Mentioned. Chap. C, April 3, 1807, *Laws of New York 1807-1809* 110.

472. Proclamation by Govenor Clinton, 1744, *Manual of the Corporation of the City of New York* 755-756 (1865).

473. Order by Governor of New York Establishing Cod Fishing Company, 24 *New York Colonial Manuscripts* 67(b) (1675).

474. Indenture by Governor Burnet to James Cooper & Company, 63 *New York Colonial Manuscripts* 71 (1721).

475. 1 *Records of the Town of East-Hampton, Long Island, Suffolk Co., N. Y.* title page, 54, 253 (1887).

476. An Act to entitle Lovis Hector Piot De Langloiserie to the Sole Fishery of Porpoises in the Province of New York during the Term of Ten Years, Chap. 484, June 17, 1726, 2 *The Colonial Laws of New York* 311-312 (1894).

477. An Act to Lay a Duty of Tonnage on Vessels for Defraying the Expence of the Light House on Sandy Hook, Chap. 1230, Dec. 20, 1763, 4 *The Colonial Laws of New York* 741-745 (1894), and An Act to Amend and Further Continue said Act, Chap. 1361, Dec. 31, 1768 *Id.* at 1039.

478. An Act for Encouragement of Whal[e]ing, Chap. 167, Sept. 18, 1708, 1 *The Colonial Laws of New York* 610-611 (1894) and Acts to Continue Said Act, Chap. 398, Nov. 19, 1720; Chap. 474, June 17, 1726; and Chap. 595, Nov. 1, 1733, 2 *The Colonial Laws of New York* 34, 298 and 818 (1894).

479. An Act for regulating the Pilots, and Establishing their Pilotage between Sandy Hook and the Port of New York, and other the Purposes therein Mentioned, Chap. 1041, Feb. 26, 1757, 4 *The Colonial Laws of New York* 173-178 (1894).

480. An Act for appointing a wreck-master in Worcester County, Chap. LXXXII, Acts of 1799 (Jan. 3, 1800), 2 Kilty, *Laws of Maryland* (1800).

481. Act relating to Fishing, *Record Containing the Agreements Acts and Lawes of the General free Assembly of the Province of West New Jersey in America and Confirmed by the Governour thereof from their first*

Session att Burlington begun the 21th day of the nyenth month called November in the yeare 1681 58 (1693).

482. Articles for the Whale Fishers, *New Jersey Secretary of State, East Jersey Deeds and Commissions, Deeds Liber 3* 22-23 (1668) (hereinafter "*East New Jersey Deeds*").

483. Commission [o]f the Whale Fishers, *East New Jersey Deeds* 23-24 (1668).

484. Whale Fishers, *East New Jersey Deeds* 152 (1678).

485. Proclamation Concerning the Whale Fishers, *East New Jersey Deeds* 152-153 (1678).

486. Application of United States as Riparian Owner and Grant by New Jersey to the United States of America of Atlantic City Light House Site Addition, (1878), as recorded in Grants and Leases of Lands Under Water, Liber D, Folio 257-263, Division of Marine Services, Department of Environmental Protection, State of New Jersey.

487. Affidavit of Harold Joseph Barker, Jr., Chief, Bureau of Marine Lands Management, Division of Marine Services, Department of Environmental Protection, State of New Jersey stating that the grant to the United States, Maine *et al.*, Exhibit No. 486, contained land continuously under water.

488. Cession during Ownership by the United States . . ., State Law §26, 56 *McKinney's Consolidated Laws of New York* 73-75, along with copy of sketch of Romer Shoal filed pursuant to Chapter 432 of the Laws of 1874, New York.

489. Grant by State of New Jersey to the United States of America of right or easement to construct an outfall sanitary sewer in the Atlantic Ocean at Fort Hancock, Sandy Hook, Highlands, Monmouth County, New Jersey, March 2, 1942, as recorded in Grants and Leases of Lands Under Water, Liber F-2, Folio 375-377, Division of Marine Services, Department of Environmental Protection, State of New Jersey.

490. *The Burlington Court Book A Record of Quaker Jurisprudence in West New Jersey 1680-1709* 46-47, 82-83, 87, 97-98 (Reed and Miller eds., 1944).

491. An Act for the preserving of Oysters in the Province of New-Jersey (March 27, 1719), Chap. XCV, *Acts of the General Assembly of the Province of New Jersey* 57-59 (1776).

492. An Act to extend certain Acts of Parliament of Great Britain . . . for the preserving of all such Ships and Goods thereof, which shall happen to be forced on Shore or stranded, Chap. CCCCXLIII, June 28, 1766 and An Act for the preserving of all such Ships and Goods thereof, which shall happen to be forced on Shore, or stranded upon the Coasts of this Kingdom, or any other of Her Majesty's Dominions. XII Anne, A.D. 1713, *Acts of the General Assembly of the Province of New-Jersey* 291, Appendix 1-5 (1776).

493. An Act for Preventing Frauds and Embezzelments and for the better Regulating and Securing his Majesty's and his Subjects, just Rights to all Drift-Whales, and other royal Fishes, that shall be cast on the Shore, or found floating on the Coasts of this Province, Chap. 76, May 10, 1699, 1 *The Colonial Laws of New York* 409 (1894).

494. An Act relative to the Jurisdiction of certain Waters in the Bay of New York and the Vicinity thereof, Chap. CLI, April 5, 1810, *A Compilation of the Laws of the State of New York Relating Particularly to the City of New York* 457 (1855) (hereinafter "*Laws of New York*").

495. An Act for the Appointment of a Commission for the Preservation of the Harbor of New York from Encroachments, and to prevent Obstructions to the necessary Navigation thereof, Chap. CXXI, March 30, 1855, *Laws of New York* 1186-1188.

496. An Act entitled "an act to provide for the Licensing and Government of the Pilots, and regulating Pilotage of the Port of New York, Ch. CCCCLXVII, June 28, 1853, *Laws of New York* 1132-1139.

497. 14 *Journals of the Continental Congress* 920-922 (1909).

498. 3 *Proceedings and Debates [of] the British Parliaments Respecting North America* title page, 9-11 (1930).

499. Acts Relating to Fish and Fishermen, Colony Laws, Chap. 46 (1646, 1652, 1668), *The Charters and General Laws of The Colony and Province of Massachusetts Bay* 113-115 (hereinafter "*Gen'l. Laws Mass. Bay*").

500. Acts To Promote The Building of Good Ships, etc., Colony laws, Chap. 91 (1641, 1645, 1663, 1671), *Gen'l. Laws Mass. Bay* 189-190.

501. An Act Respecting Wrecks Of The Sea, Colony Laws, Chap. 107 (1641, 1647), *Gen'l. Laws Mass. Bay* 211.

502. Acts Respecting The Fisheries and Maritime Affairs, Appendix, Chap. 5 (1639, 1673), *Gen'l. Laws Mass. Bay* 716-721.

503. An Act For The Regulating And Encouragement Of Fishery (Nov. 26, 1692), Chap. 32, Acts of 1692/93, *The Acts And Resolves, Public and Private, Of The Province Of The Massachusetts Bay* 71 (hereinafter "*Mass. Bay Acts And Resolves*").

504. An Act For The Explaining And Altering of Some Clauses . . . (Feb. 17, 1692/93) Chap. 46, Acts of 1692/93, *Mass. Bay Acts and Resolves* 101-103 (see Sec. 7 p. 102).

505. An Act Establishing Of Seaports Within This Province, And For Ascertaining The Fees For Entring And Clearing Of Vessels Inward And Outward Bound (June 27, 1698), Chap. 14, Acts of 1698, *Mass. Bay Acts And Resolves* 335-336.

506. An Act For The Reviving And Re-Enacting A Clause In . . . "An Act For The Regulating And Encouragement Of Fishery" . . . (Nov. 11, 1702), Chap. 12, Acts of 1702, *Mass. Bay Acts And Resolves* 507-508.

507. An Act To Prevent The Annoying Or Stopping Up Of Harbours And The Unjust Taking Off Ballast From The Shoar[e] (Nov. 6, 1713), Chap. 10, Acts of 1713/14, *Mass. Bay Acts And Resolves* 723.

508. An Act For Building And Maintaining A Lighthouse Upon The Great Brewster (Called Beacon Island) At The Entrance Of The Harbour Of Boston (July 23, 1715), Chap. 4, Acts of 1715/16, *Mass. Bay Acts And Resolves* 7-8.

509. An Act For Regulating The Ferr[ie][y]s Between The Count[ie][y]s of Barnstable And Dukes County (Dec. 16, 1729), Chap. 7, Acts of 1729/30, *Mass. Bay Acts and Resolves* 544-545.

510. An Act In Addition To An Act . . . For Building And Maintaining A Light-House . . . (June 22, 1751), Chap. 2, Acts of 1751/52, *Mass. Bay Acts and Resolves* 567.

511. An Act For The Better Regulating The Fishery (Feb. 14, 1757), Ch. 27, Acts of 1756/57, *Mass. Bay Acts And Resolves* 1030.

512. An Act to Prevent the Destruction of Oysters in the Several Bays and Rivers Hereafter Mentioned, Within this Province (February 28, 1765), Chap. 25, Acts of 1764/65, *Mass. Bay Acts and Resolves* 743.

513. An Act to prevent the destruction of Oysters in the several places therein mentioned, Chap. 6, Acts of 1790, Massachusetts.

514. An Act to revise and continue an Act entitled an Act to prevent the Destruction of Oysters in the several Places therein mentioned, Ch. 16, Acts of 1793, Massachusetts.

515. An Act to prevent the destruction of Oysters & other Shellfish in this Commonwealth, Chap. 71, Acts of 1796, Massachusetts.

516. An Act to prevent the destruction of the Lobster Fishery in the town of Provincetown in the county of Barnstable, and to preserve and regulate the same in the waters and shores of said town, Chapter 27, Acts of 1812, Massachusetts.

517. An Act regulating the Pilotage of the Port of Boston, Chap. 45, Acts of 1819, Massachusetts.

518. An Act for establishing the compensation for piloting vessels through the Vineyard Sound, over Nantucket Shoals in Certain Cases, Chap. 155, Acts of 1820, Massachusetts.

519. An Act for the preservation and regulation of the Fishery in the towns of Fairhaven, New Bedford, Dartmouth & Westport, Chap. 97, Acts of 1822, Massachusetts.

520. An Act in addition to . . . "an act to prevent the destruction of the Lobster Fishery, in the town of Provincetown," Chap. 102, Acts of 1822, Massachusetts.

521. An Act for the preservation and regulation of the Fishery in the Town of Falmouth, Chap. 63, Acts of 1826, Massachusetts.

522. An Act to prevent the destruction of fish in the harbor of Edgartown by seining thereof, Chap. 54, Acts of 1827, Massachusetts.

523. An Act To regulate pilotage from the sea into New Bedford and Fairhaven, Chap. 88, Acts of 1827, Massachusetts.

524. An Act To Regulate the Pilotage for the Harbour of Boston, Chap. 2, Acts of 1829, Massachusetts.

525. An Act, in addition to an Act, to regulate Pilotage from the Sea into New Bedford and Fairhaven, Chap. 37, Acts of 1830, Massachusetts.

526. An Act to prevent the destruction of fish by cocculus indicus, or other poisonous articles, Chap. 43, Acts of 1831, Massachusetts.

527. The Body of Liberties, Sec. 16 (1641), *Colonial Laws of Massachusetts, Reprinted from the Edition of 1660, with the Supplements to 1672, Containing Also, The Body of Liberties of 1641* 37 (1889) (hereinafter "*Col. Laws Mass.*").

528. The Body of Liberties, Sec. 90 (1641), *Col. Laws Mass.* 53.

529. Order of May 23, 1650, *Col. Laws Mass.* Intro. 93.

530. Order of October 23, 1651, *Col. Laws Mass.* Intro. 94.

531. Law concerning Ballast (1646), General Lawes, 1658, *Col. Laws Mass.* 125.

532. Law concerning Publicke Charges, Sec. 3, General Lawes, 1658, *Col. Laws Mass.* 134.

533. Law concerning Common Liberties (1641, 1647), Sec. 2, General Lawes, 1658, *Col. Laws Mass.* 170.

534. Law concerning Masters, Servants, Labourers (1630, 1633, 1635, 1636, 1641), Sec. 3, General Lawes, 1658, *Col. Laws Mass.* 174.

535. Law concerning Ships, Ships-Carpenters (1645), Sec. 2, General Lawes, 1658, *Col. Laws Mass.* 192.

536. Law concerning Treasurers (1648, 1654, 1657, 1658), Sec. 1, General Lawes, 1658, *Col. Laws Mass.* 196.

537. Law concerning Wharfage (1647), Sec. 2 and 3, General Lawes, 1658, *Col. Laws Mass.* 200.

538. Law concerning Wrecks of the Sea (1641, 1647), General Lawes, 1658, *Col. Laws Mass.* 203.

539. Law concerning Repeal of Lawes about Shipping and Fishing Aug. 7, 1661, Supplements 1661-1668, *Col. Laws Mass.* 220.

540. Law concerning Drinking of Healths, Etc., October 20, 1663, Supplements 1661-1668, *Col. Laws Mass.* 225.

541. Law concerning Maritime Affaires, Oct. 14, 1668, Supplements 1661-1668, *Col. Laws Mass.* 251-256.

542. An Act in addition to "An Act to regulate the pilotage for the harbour of Boston," Chap. 10, Acts of 1834, Massachusetts.

543. An Act to prevent obstructions in the Harbor of Salem, Chap. 12, Acts of 1838, Massachusetts.

544. An Act concerning the Sea Coast Fisheries, Ch. 85, Acts of 1839, Massachusetts.

545. An Act to protect the shad fishery in Monomoy Bay, Chap. 62, Acts of 1842, Massachusetts.

546. An Act relating to Pilotage, Chap. 45, Acts of 1841, Massachusetts.

547. Letter dated November 8, 1945 from United States Coast Guard to New York Department of State, Division of the Land Office and Drawing No. NYCD-C-328, sheets 1 and 2.

548. Report of the Attorney-General In the Matter of the Application of United States of America for a grant of easement for submarine cables between Rockaway Beach, Queens County and Monmouth Beach, New Jersey, *Proceedings of the Board of Commissioners of the Land Office for 1945* 79-80.

549. Easement from the State of New York to the United States of America to install, maintain and operate two communication cables under the waters of the Atlantic Ocean, February 25, 1946 as recorded at pages 354-355, Book 71 of Letters Patents, filed in the office of the State of New York Department of State.

550. An Act in addition to the Act entitled An Act to prevent the distruction [*sic*] of Oysters and other shell fish in this Commonwealth, Chap. 14, Acts of 1798, Massachusetts.

551. An Act, in addition to an Act, entitled, an Act to prevent the distruction [*sic*] of Oysters & other shell fish in this Commonwealth, Chap. 19, Acts of 1799, Massachusetts.

552. An Act to preserve the Eel Fishery, and to prevent the destruction of Oysters and all other shell fish in the Town of Harwich, Chap. 66, Acts of 1825, Massachusetts.

553. An Act, in addition to "An Act to prevent the destruction of Oysters, and other Shell Fish in this Commonwealth," Chap. 2, Acts of 1830, Massachusetts.

554. Indian deed of Southhampton, Dec. 13, 1640, *The First Book of Records of the Town of Southampton with Other Ancient Documents of Historic Value* title page, publisher's notice and 12-14 (1874).

555. Affidavit of David H. Flaherty.

556. Certificate of David H. Flaherty concerning translations from the French.

557. Certificate of Marcella Jane Charlton concerning translations from the Latin.

558. William Ryley, Senior, "The Soveraigntie of the English Seas Vindicated and Proved, by Some Few Records (Amongst Many Others of that kynd) Remayning in the Tower of London" (MSS 1652), Harleian MSS 4314, British Museum (hereinafter "Ryley Treatise"), title page and table of contents and 409-410 Fulton, *The Sovereignty of the Seas* (London, 1911).

559. "A License to the Men of Holland, Zeland and Frisland to Fish . . . Anno. 23, Edward I" [1295], Ryley Treatise, fol. 2.

560. "A Security Granted to the Fishermen of France to Fish in the Sea Neare the River of Sarme for a Season in 5 Henry 4 [?]" [1404], Ryley Treatise, fol. 19.

561. "The like was granted by treaty between Hen 6 and those of Brabant and Flanders 18 Henry 6" [1440] Ryley Treatise, fol. 21.

562. "The Custody of the Sea Granted to Henry Duke of Exeter Anno 38 Hen. 6" [1461], Ryley Treatise, fol. 25.

563. "In a Truce between Edward 4th and Francis Duke of Brittaine a Protection is Granted to the Fishermen of the Duke of Brittaine" [1468], Ryley Treatise, fol. 27-28.

564. "Sir John Hemingham Knight . . . Appointed Wafters to Guard the Fishers not onely of England by Foraigners and to take a reasonable proportion of every ship towards their Costs and Expenses . . . ." [1483], Ryley Treatise, fol. 29.

565. "The Reasons of the Strangers answered . . . fishing in His Majesties Seas . . . ." [circa 1605-1615] Papers of Sir Julius Caesar, Admiralty, Lansdowne MSS 142, fol. 367-368, British Museum (hereinafter "Caesar Papers"). *See also,* Maine *et al.,* Exhibit No. 595.

566. "The Case Between Browne the Scottish Man and the Dutch Captaine" and "The . . . Case between His Majesty and the States of the United Provinces . . . ." [1617], Caesar Papers, fol. 398, 400.

567. Memorandum of Mr. Dudley Carleton to the States-General, 6 September 1617, from "Netherland Transcripts, 1615-1619. Presented by Viscount Palmerston." Additional MSS 17,677, I, fol. 213 recto to 215 verso, British Museum.

568. Collection relating to naval matters, copies from the papers of Samuel Pepys; "Observation on the Dominion and Sovereignty of the Seas, by Sir Philip Meadows, with papers . . . relating to admiralty jurisdiction" (hereinafter "Pepys Papers"), Additional MSS 30,221, fol. 43 verso, British Museum. [Lords of the Admiralty Order for Composing a Reglement for the Narrow Seas 1633].

569. "Reglement for Preventing Abuses in and about the Narrow Seas and Ports" [1634], 759-761 Fulton, *The Sovereignty of the Seas* (London, 1911).

570. SP 16/307, no. 48. State Papers Domestic, Charles I. [Draft of a proclamation, circa 1635.]

571. SP 16/313, no. 24. State Papers Domestic, Charles I. [Lords of Admiralty to the King, February 1636.] *See also,* Maine *et al.,* Exhibit No. 604.

572. SP 16/319, no. 81. State Papers Domestic, Charles I. [Agenda for Lords of the Admiralty, April 30, 1636.]

573. SP 16/320, no. 14. State Papers Domestic, Charles I. [Record of Agenda of Lords of Admiralty, May 3, 1636] and *CSP, Dom.* 1635-36, p. 405.

574. SP 16/326, no. 32. State Papers Domestic, Charles I. [Admiralty directive to Northumberland concerning fishing licenses, June 14, 1636.] *See also,* Maine *et al.,* Exhibit No. 607.

575. SP 16/329, no. 78. State Papers Domestic, Charles I. [Draft form of license for Calais fishermen, 1636.]

576. SP 16/330, no. 41. State Papers Domestic, Charles I. [Letter from Northumberland to Secretary Windebank, August 16, 1636.]

577. SP 16/333, no. 26. State Papers Domestic, Charles I. [Letter from Northumberland to Secretary Windebank, October 6, 1636.]

578. SP 16/343, no. 72, fol. 193 recto, 194 verso, 195. State Papers Domestic, Charles I (1636). [Admiral Northumberland's Instructions to the Fleet, 1636.]

579. SP 16/343, no. 72, fol. 201-202, 205-210, 215. State Papers Domestic, Charles I. [Text of Journal kept during Admiral Northumberland's summer voyage, May 15 to Oct. 9, 1636.] *See also,* Maine *et al.,* Ex. Nos. 606 and 607.

580. SP 16/346, no. 23. State Papers Domestic, Charles I. [Letter from Stephen Goffe to Archbishop Laud, February 2, 1636.]

581. SP 16/348, no. 62. State Papers Domestic, Charles I. [Letter from Laud to the Queen of Bohemia, February 28, 1636.]

582. SP 16/351, no. 1. State Papers Domestic, Charles I. [Letter to Archbishop Laud from the Queen of Bohemia, March 25/April 4, 1637.]

583. SP 16/364, no. 45. State Papers Domestic, Charles I. [Letter to Secretary Windebank from Captain Fielding, July 24, 1637.]

584. SP 18/71, no. 78. State Papers Domestic, Interregnum. [Letter to the Commissioner for the Admiralty from Vice Admirall Lawson, May 13, 1654.]

585. SP 18/71, no. 79. State Papers Domestic, Interregnum. [Letter to Secretary Blashbourn of the Admiralty from Vice Admirall Lawson, May 13, 1654.]

586. SP 25/75, paragraphs 9 and 10. State Papers, Interregnum. [Record of meeting of Council of State, June 9, 1654] and *CSP, Dom. Commonwealth 7, 1654,* p. 205.

587. SP 29/178, no. 172. State Papers Domestic, Charles II. [Gysbert Peterson's lycense to fish.]

588. SP 44/23, p. 283. State Papers Domestic, Charles II, Entry Book 23, [Fishing License to Gysbert Peterson, November 21, 1666] and *CSP, Dom.* Charles II, 1666-67, page 277.

589. SP 44/23, p. 475. State Papers Domestic, Charles II, Entry Book 23. [Fishing License to Gysbert Peterson, June 7, 1667.]

590. SP 44/18, p. 213. State Papers Domestic, Charles II, Entry Book 18, paragraph 3. [Recommendation that a fishing license be issued. July 12, 1666.]

591. SP 44/23, p. 217. State Papers Domestic, Charles II, Entry Book 23, final paragraph. [Concerning a license for Bruges fishing boats. July 17, 1666.]

592. Pepys Papers, Additional MSS 30,221, fol. 67 verso. [Record of a Meeting of the King in Council, April 8, 1677.]

593. Pepys Papers, Additional MSS 30,221, fol. 66 verso. [Record of a royal order in Council, 1687.]

594. Miscellaneous Admiralty 7. "Compilation of miscellaneous documents relating to the history of the Navy, the Dominion and Sovereignty of the seas, salutes, etc.," Public Record Office. Vol. 730, "A Collection of Several Manuscripts taken out of Sir William Penn's Closet Relating to the Affairs of the Navy Humbly Dedicated and Presented to the King by his son William Penn," p. 279.

[Maine *et al.*, Exhibit Nos. 595-612 are portions of SP 29/339 of the State Papers Domestic, Charles II. The title of the volume is "A Collection of Divers Particulars Touching the Kings Dominion and Sovereignty in the Fishings as well in Scotland." It contains material prepared for the English plenipotentiaries to the Cologne peace negotiations with the Dutch held in August, 1673.]

595. SP 29/339, p. 17. State Papers Domestic, Charles II. [Arguments of Strafford.] *See also*, Maine *et al.*, Exhibit No. 565.

596. SP 29/339, pages 145-147, 151-152. [Excerpts from materials for 1673 negotiators entitled "At What Distances from the Coasts of England the Holland Fishers have Used to be Kept by His Majesties Men of Warr, in their Herring Fishing."]

597. SP 29/339, p. 161. [Summary of Restrictions Placed Upon Dutch Fishermen.]

598. SP 29/339, pages 211-212. [Notes and instructions on the fisheries issue for the 1673 negotiators.]

599. SP 29/339, pages 223-224. [Report concerning capture of Browne, the herring-assize collector.] *See also*, Maine *et al.*, Exhibit Nos. 566 and 567.

600. SP 29/399, pages 347-350. [License to French fishermen.]

601. SP 29/339, pages 355-358. [Letter from Dudley Carleton, English negotiator at The Hague to Secretary Naunton in England, Dec. 30, 1618.]

602. SP 29/339, p. 381. [A statement concerning fishing.]

603. SP 29/339, p. 393. [1626 Request from Governor of Dieppe for Renewal of Fishing Licenses.]

604. SP 29/339, pages 401-405. [Admiralty judges' opinion, February 25, 1635.] *See also*, Maine *et al.*, Exhibit No. 571.

605. SP 29/339, pages 437-440. [Excerpts from letters from Sir Francis Windebank and Sir William Boswell concerning licenses for the Dutch to fish. 1636-37.]

606. SP 29/339, pages 441-442. [Extracts from the Earl of Northumberland's Journal, 1636.] *See also,* Maine *et al.,* Exhibit No. 579.

607. SP 29/339, pages 445-446, 449-50, 467. [Directive to Earl of Northumberland and his accounts from issuance of fishing licenses.] *See also,* Maine *et al.,* Exhibit Nos. 574 and 577.

608. SP 29/339, p. 543. [Letter from Secretary Windebank to Mr. Gerbier, Nov. 17, 1637.]

609. SP 29/339, p. 551. [Letter from Secretary Windebank to Sir Balthasar Gerbier, Dec. 29, 1637.]

610. SP 29/339, p. 571. [Communication from Secretary Windebank, July 15, 1639.]

611. SP 29/339, pages 591-592. [Communication from people of Bruge to Charles II requesting permission to fish in seas belonging to his kingdom.]

612. SP 29/339, pages 589-590. [Grant of fishing licenses to Bruges fishermen, 1666.]

613. Captain Cyprian Southack, Map entitled "The New England Coasting Pilot from Sandy Hook, New York, unto Cape Canso." [1720?], CO 700, North America, New England 5, Public Record Office, London. (Southack also published at Boston in 1717 an engraved *Chart of the English Plantations in North America.* This map has the following notation on its face: "As far as the Prickt Line runs I have been Cruising in the Service of the Crown of Great Britain from the Year 1690 to the Year 1712. Which General Chart distinct from this will be Compleated with the Maps of the Harbour in Six Months time Fit to

be Printed for the Use of my Brother Mariners it being my twenty two Years hard Labour and Pain.")

614. William Faden, Map of "The United States of North America with the British and Spanish Territories, according to the treaty of 1784 (sic) Engraved by Wm. Faden, Geographer to the King. Publ'd. Feb. 11, 1785." CO 700, North America, General No. 16, Public Record Office, London.

615. "Map of New England relating to the dispute over the boundaries of New Hampshire and Maine," Ms. map, 1726. CO 5/869 fol. 346 (MPG 19), Public Record Office, London.

616. Map of southern part of New Hampshire, 1733, CO 5/875/84 (MPG 363), Public Record Office, London. (Submitted by John Rindge, agent for the New Hampshire Assembly, concerning a boundary dispute with Massachusetts.

617. "Map of the Coast-line of Maine showing boundaries, 1779, CO 217/54/211 (MPG 216), Public Record Office, London, *see also,* Maine *et al.,* Exhibit No. 619.

618. Affidavit of David H. Flaherty.

619. CO 5/54, pp. 239-243. [Remarks of Charles Morris concerning Nova Scotia.] *See also,* Maine *et al.,* Exhibit No. 617.

620. SP 25/68, pp. 138, 157, 160, State Papers Domestic, Interregnum Council of State, and SP 25/132, pages 14-15, State Papers Domestic, Interregnum. "Committee for Foreign Affaires." [Entries concerning licensing of Diep fishermen, 1652.]

621. HCA 1/10/Part I/No. 23. Admiralty Records. [Indictment of Bartlet, Heritson and Marshall for Failure to Salute the English Flag. December 30, 1674.]

622. HCA 1/10/Part I/No. 32. Admiralty Records. [Petition of Bartlet, Heritson and Marshall for release from Newgate. January 1674/75.]

623. HCA 1/11/No. 17. High Court of Admiralty. Oyer and Terminer Records. Public Record Office, London. (Hereinafter "Admiralty Records.") [Indictment of Peter Giraudeau, for failure to salute the English flag, @ December/January 1676/77.]

624. HCA 1/10/Part II/No. 141. Admiralty Records. [Trial of Peter Giraudeau, January 1676/77.]

625. HCA 1/11/Part I/No. 3. Admiralty Records. [Original information against Selingue and De Ville for failure to Salute the English Flag. March 1676/77.]

626. HCA 1/11/Part I/No. 4. Admiralty Records. [Warrant from the Lords of the Admiralty to the Marshall of the Court for taking Selingue and De Ville into custody, June 1677.]

627. HCA 1/11/Part I/No. 14. Admiralty Records. [Indictment against Selingue and De Ville, 1677.]

628. HCA 1/11/Part I/No. 18. Admiralty Records. [Latin minutes of trial of Selingue and De Ville, August 27, 1677.]

629. HCA 1/11/Part I/No. 20. Admiralty Records. [Crown warrant for pardon of Selingue, August, 1677.]

630. SP 9/53, fols. 53 and 57. State Papers Miscellaneous. [Excerpts concerning "Defence of the Narrow Seas.

May, 1576," from bound Mss Volume "of Memoranda and copies of documents, partly in Sir Joseph Williamson's (Keeper of the State Papers, 1661-1702) hand, relating to the Navy and Sovereignty of the Seas" (hereinafter "Williamson Mss.").]

631. SP 9/53, fols. 33-35. State Papers Miscellaneous. [Williamson Mss., Instructions to Admirals, dated 1557, 1626, 1628, 1633.]

632. Miscellaneous Admiralty 7. "Compilation of miscellaneous documents relating to the history of the Navy, the Dominion and Sovereignty of the seas, salutes, etc." Public Record Office. (Hereinafter "Admiralty 7") Vol. 730, "A Collection of Several Manuscripts taken out of Sir William Penn's Closet Relating to the Affairs of the Navy Humbly Dedicated and presented to the King by his son William Penn," @ 1680 (hereinafter "Vol. 730") fols. 97, 103-107, 116. [Excerpts from Instructions of Lords of Admiralty and Cinque Ports, 1647.]

633. Admiralty 7; Vol. 729, "A Collection of Papers and Notes upon the Subject of the Dominion and Sovereignty of the British Seas, the Right of the Flag and all Matters relating to Salutes and Colours," (hereinafter "Vol. 729") fols. 149-150. [Copy of the 32nd Article of the General Printed Instructions annexed to the Commanders of His Majesty's Ships Commissions, touching Salutes, 1660's or 1670's.]

634. Pepys Papers, Additional Mss. 30,221, fols. 46 verso to 47 verso. British Museum. [Draught by Sir Leoline Jenkins about the King's Sovereignty in the British Seas, circa 1672.]

635. Admiralty 7; Vol. 729, fols. 126-127. [Letter from Trinity House concerning the extent of the British seas, 1671.]

636. Admiralty 7; Vol. 729, fols. 221, 227-28. [Trinity House Resolution concerning westward boundary of English Channel, 1668 and excerpt from Opinion of the Extent of the Jurisdiction of the Cinque Ports, 1686.]

637. CO 388/90, fols. 29-31. Board of Trade. [A copy of Sir Henry Penrice's Report on the extent of the British Seas, 1721.]

638. Admiralty 7; Vol. 723, fols. 1-23. [Translation of the Patent to Earl of Pembroke to be Lord High Admiral, January 26, 1701.]

639. Admiralty 7; Vol. 723, fols. 168-183. [Patent to a Vice Admiral of Jamaica, September 11, 1727.]

640. Admiralty 7; Vol. 723, fols. 143-155. [Translation of the Patent of Sir Henry Penrice as Judge of the High Court of Admiralty, November 10, 1727.]

641. Admiralty 7; Vol. 724, fols. 1-7. [Excerpt of Patent to Duke of York as Lord High Admiral of England, probably 1670's.]

642. Admiralty 7; Vol. 724, fols. 23-29, 44. [Excerpt of Patent to Duke of York as Lord High Admiral of Dunkirk, New England, etc., 1674.]

643. Calendar of the Patent Rolls Preserved in the Public Record Office, Elizabeth I. V. 1569-1572 (London, 1966), p. 297. [Patent Conveying land recovered from the sea to Thomas Digges, 1571. *See*, tr. p. 144.

644. SP 14/5, No. 55. [James I grant of Marsh land and land gained from the sea, 1603. *See*, tr. p. 144.]

645. SP 38/12. Entry Book, James I and *CSP, Dom. 1619-1623* James I, p. 625. [Warrant Conveying derelict land to Charles Barrett, June 30, 1623. *See*, tr. p. 145.]

646. C 205. Chancery Petty Bag. Special Commissions. (1607-1889). Title page, conspectus of special commissions and itemized description of bundle 6, concerning derelict lands.

647. C 205/6, Chancery Petty Bag. Special Commissions. Derelict Lands (hereinafter "C 205/6"), No. 1. [Transcription of inquisition before crown commissioners, 1636.]

648. C 205/6, No. 2. [Transcription of Articles and Interrogations before Commissioners concerning derelict lands in Essex and Kent, 1688.]

649. C 205/6, No. 4. [Transcription of Depositions before Commissioners concerning derelict lands in Sussex, 1695.]

650. T 1/29. Treasury Papers, August 4, 1694, pp. 16-20 and *Cal. Treasury Papers, 1557-1696*, p. 383. [Report of the Attorney General on Lady Anglesey's petition for derelict lands, her petition and Affidavit of Thomas Young, 1694. *See*, tr. p. 145.]

651. T 1/39, fols. 148-156, May – August, 1696. Treasury Papers. [Petition of Percival Bunskill for derelict lands reports of Attorney General and Surveyor General and affidavits.]

652. T 29/9, Minute Book, Treasury, pp. 230-34 and *Cal. Treasury Papers, 1557-1696*, p. 537. [Minutes of a hearing concerning a grant of derelict lands. July 28, 1697.]

653. T 1/47, No. 32. Treasury Papers. [Petition of Percival Bunskill to Lords Justices seeking a hearing concerning his petition for derelict lands and reference of matter to the Lords Commissioners of the Treasury, 1697.]

654. T 1/57/No. 32. Treasury Papers. [Papers relating to petition of Joseph Ayloff concerning Derelict lands in Sussex and Kent, 1698.]

655. T 1/57, fols. 54-66, Oct. 25, 1698. Treasury Papers. [Report of the Attorney General on Petition of Francis Geary concerning derelict lands and supporting affidavits.] *See*, tr. p. 145 and Maine *et al.*, Ex. No. 219.

656. DL 44/1272 3 George I, 1717. [Survey and Commission for derelict lands in the Duchy of Lancaster.]

657. C 66/3339, No. 22 Patent Rolls. [Patent to Neale for wrecks, etc. within 20 leagues of Bermuda, 1690.]

658. CO 5/1303; fols. 76-77. Rhode Island. [Excerpt showing introduction of 1691 Massachusetts Charter as evidence before the commissioners inquiring into Rhode Island – Massachusetts boundary dispute, 1741.]

659. CO 5/885. New England. Board of Trade. Original Correspondence, 1744-1747. [Copy of a letter from Massachusetts Governor Shirley to Lords of Trade, March 27, 1745.]

660. CO 5/372, fols. 292-293. South Carolina. Board of Trade. Original Correspondence. [Excerpt from a letter to the Board by Governor Glen, 1751.]

661. *Madison Papers* (Hutchinson & Rachal ed.), Vol. 2, pp. 114-17, 127-37. [Distributed by mail on December 5, 1972; admitted into evidence on January 24, 1973.]

662. Abernethy, Thomas Perkins, *Western Lands and the American Revolution*, pp. 11-12, 83-84, 271-73, 362-69 (1959).

663. Andrews, Charles M., *The Settlements*, Vol. I, in *The Colonial Period of American History*, pp. 78-82, 262-64, 279-80, 300-05, 312-13, 320-25, 344-49.

664. Andrews, Charles M., *The Settlements*, Vol. III, in *The Colonial Period of American History*, pp. 211-12.

665. Andrews, Charles M., *England's Commercial and Colonial Policy*, in *The Colonial Period of American History*, pp. 341-46.

666. Bancroft, George, X *History of the United States from the Discovery of the American Continent*, pp. 420-23 (Boston, 1874).

667. Benedict, Erastus C., 4 *The Law of American Admiralty: Its Jurisdiction and Practice*, pp. 360-62, 367-70 (1940).

668. Bingham, Joseph Walter, etc., *Joint Memorandum in Support of Rehearing in United States* v. *Texas*, 3 Baylor L. Rev. 319-35 (1951).

669. Bollan, William, biography of, in *Dictionary of American Biography*, Vol. 2, p. 420 (1929).

670. Bollan, William, *Observations on the Preliminary Articles of Peace, so far as they relate to the Fishery*, pp. 1-4 (1941 ed.).

671. Bollan, William, *The Importance and Advantage of Cape Breton*, pp. 36-40, 88-93, 108-09 (1746).

672. Bollan, William, *A Succinct View of the Origin of our Colonies*, pp. 8-11, 18-23 (1766).

673. Bollan, William, *The Ancient Right of the English Nation to the American Fishery*, pp. 1-4, 8-13, 20-25, 34-50, 55, 82-100, 103-05 (1764).

674. *British and Foreign State Papers, 1812-1814.* Vol. I – Part I, pp. 354-74, 420-27, 663-67, 710-45 (1841).

675. Burchett, Josiah, *A Complete History of the Most Remarkable Transactions at Sea*, preface, pp. 21-22, 26-28, 34-37 (1720).

676. Bruce, John (ed.), *Calendar of State Papers, Domestic Series, of the Reign of Charles I, 1635-1636*, pp. 31, 393, 416, 560-61 (1866).

677. Bruce, John (ed.), *Calendar of State Papers, Domestic Series, of the Reign of Charles I, 1633-1634*, pp. 271-72, 282, 289, 291, 299, 312-13, 318, 324, 430, 493 (1863).

678. Bruce, John (ed.), *Calendar of State Papers, Domestic Series, of the Reign of Charles I, 1635*, pp. 127-28, 402 (1865).

679. Bruce, John (ed.), *Calendar of State Papers, Domestic Series, of the Reign of Charles I, 1631-1633*, pp. 51-52, 230, 237-38, 243-46, 303, 384, 398-99, 479 (1862).

680. Callis, Robert, *The Statute of Sewers*, pp. 39-55 (1685 ed.).

681. *Commissioners For Trade and Plantations, Journal of, 1759-1763*, pp. 310-12, 347-48, 406 (1935).

682. *Commissioners For Trade and Plantations, Journal of, 1754-1758*, pp. 410-11 (1933).

683. Crump, Helen J., *Colonial Admiralty Jurisdiction in the Seventeenth Century*, pp. 24-35, 58-59 (1931).

684. Donaldson, Thomas, *The Public Domain, Its History, With Statistics*, pp. 10-11, 32-33, 56-60, 85-86 (1884).

685. Exton, John, *The Maritime Dicaeologie, or Sea-Jurisdiction of England*, pp. 10-12 (London, 1664).

686. Farrand, Max, *The Fathers of the Constitution*, pp. 14-15, 55-59 (1921).

687. Farrand, Max, 1 *Records of the Federal Convention of 1787*, pp. 24-27, 38-40, 122-23, 145, 177-86, 257-59, 282-83, 500.

688. Farrand, Max, 2 *Records of the Federal Convention of 1787*, pp. 134-37.

689. Farrand, Max, 3 *Records of the Federal Convention of 1787*, pp. 101-02, 138-43, 483-90, 516-18, 521-24.

690. Fenn, Thomas Percy, Jr., *The Origin of The Right of Fishery in Territorial Waters*, pp. 70-80, 93-94, 98-118, 122-26, 130-49, 155-57, 170-75, 196, 219-23 (1926).

691. Fortescue, Sir John, *De Laudibus Legum Angliae*, notes, pp. 30-37 (1616).

692. Fortescue, Sir John, 2 *De Laudibus Legum Angliae*, pp. iii, 66-69 (Gregor ed., 1741).

693. Fulton, Thomas Wemyss, *The Sovereignty of the Sea*, pp. 39-45, 134-48, 152-53, 174, 192-93, 211-13, 216-41,

288-89, 301-02, 347, 352-65, 378-80, 409-13, 426-27, 440-45, 458-61, 469-70, 483-84, 487-88, 496-97, 506-07, 511-13, 517-18, 521-27, 539-41, 550-52, 571-75, 604-15, 650-52, 663-65, 681-732, 762-64 (1911).

694. Goebel, Julius, Jr., Vol. 1, *Antecedents and Beginnings to 1801, History of the Supreme Court of the United States.* The Oliver Wendell Homes Devise, pp. 145-46, 151, 194, 196, 221, 723, 766-70.

695. Godolphin, John, *A View of the Admiral Jurisdiction,* pp. 24-25, 32-71, 148-51 (1661).

696. Hamilton, Alexander, *The Works of Alexander Hamilton* (Henry Cabot Lodge ed.), Vol. IV, pp. 230, 253-54, 288-89, 359, 360 (1922).

697. Hamilton, Alexander, *The Works of Alexander Hamilton* (Henry Cabot Lodge ed.), Vol. V, pp. 26-35, 476, 487-90 (1922).

698. Hamilton, Alexander, *The Works of Alexander Hamilton* (Henry Cabot Lodge ed.), Vol. VIII, pp. 5, 42-62 (1922).

699. Hanna, John, "The Submerged Land Cases," 3 Baylor L. Rev., pp. 201-40 (1951).

700. Henkin, Louis, *Foreign Affairs and the Constitution,* pp. 18-29, 288-93 (1972).

701. Hyde, Charles Cheney, "The International Law of the Texas Tidelands Case," 3 Baylor L. Rev., pp. 172-87 (1951).

702. Jefferson, Thomas, *The Writings of Thomas Jefferson* (Paul Leicester Ford ed.), Vol. VIII, 1801-1806, pp. 19-21, 319-20, 447-50 (1897).

703. Jensen, Merrill, *The New Nation – A History of the United States During the Confederation 1781-1789,* pp. 23-25, 43-46, 83, 126-27, 424-25 (1965).

704. *Journals of the Continental Congress 1774-1789,* Vol. VII, pp. 121-23 (1907).

705. *Journals of the Continental Congress 1774-1789,* Vol. VIII, pp. 520-23 (1907).

706. *Journals of the Continental Congress 1774-1789,* Vol. XI, pp. 546-47 (1908).

707. *Journals of the Continental Congress 1774-1789,* Vol. XXIII, pp. 471-524, 693-94 (1914).

708. *Journals of the Continental Congress 1774-1789,* Vol. XXV, pp. 554-64 (1922).

709. *Journals of the Continental Congress 1774-1789,* Vol. XXVI, pp. v-vi, 8, 109, 112-17 (1928).

710. Justice, *A General Treatise of the Dominion and Laws of the Sea,* pp. 128-58 (1705).

711. Kavenagh, W. Keith, *Town Lands and the Trust Doctrine: Huntington, New York as a case study, 1653-1972,* map, pp. 42-43, 91-92 (1972).

712. Keller, Arthur S., etc., *Creation of Rights of Sovereignty through Symbolic Acts 1400-1800,* pp. 3-5, 148-51 (1938).

713. King, Charles, R. (ed.), *The Life and Correspondence of Rufus King,* Vol. IV (1801-1806), pp. 368-69.

714. Labaree, Leonard Woods, *Royal Instructions to British Colonial Governors 1670-1776,* Vol. 2, pp. 692-93.

715. Laing, Lionel H., "Historic Origins of Admiralty Jurisdiction in England," 45 Mich. L. Rev., pp. 163-74 (1947).

716. *The Laws, Ordinances, and Institutions of the Admiralty of Great Britain, Civil and Military*, Vol. I, pp. 1-13, 26-39, 112-18, 378-79, 394-95, 412-17 (1746).

717. *The Laws, Ordinances, and Institutions of the Admiralty of Great Britain, Civil and Military*, Vol. 2, pp. 40-41 (1746).

718. Lediard, Thomas, *The Naval History of England*, Vol. 1, pp. 35-43 (1735).

719. Lounsbury, Ralph Greenlee, *The British Fishery at Newfoundland 1634-1763*, pp. 30-31, 50-55, 61, 76-95, 102-04, 108-16, 126-33, 137, 147, 182-89, 229-43 (1969).

720. McFarland, Raymond, *A History of the New England Fisheries*, pp. 26-35, 64, 69-75, 78-81, 98-101, 113-20, 125-27 (1911).

721. Maine Historical Society, *Collections*, Vol. V, pp. 75-81 (1857).

722. Malynes, Gerard, *Lex Mercatoria: Or, The Ancient Law-Merchant*, p. 2 (1686).

723. Marsden, Reginald G., 1 *Select Pleas in the Court of Admiralty*, pp. xxii, xxxiv (1894).

724. Massachusetts, *Colonial Laws*, pp. 52-54 (1887).

725. Medows, Sir Philip, *Observations Concerning the Dominion and Sovereignty of the Seas*, pp. 4-5, 46-47 (1689).

726. Molloy, Charles, *De Jure Maritimo et Navali: Or A Treatise of Affairs Maritime, and of Commerce*, Vol. 1, pp. 72-73, 82-83, 102-31 (1769).

727. Molloy, Charles, *De Jure Maritimo et Navali: Or A Treatise of Affairs Maritime, and of Commerce*, Vol. 2, pp. 204-11 (1769).

728. Moore, Stuart A., *A History of the Foreshore and The Law Relating Thereto with a Hitherto Unpublished Treatise By Lord Hale, Lord Hale's "De Jure Maris," and Hall's Essay on the Rights of the Crown in the Sea-shore*, pp. xxvii-liv, 20-21, 41, 50-53, 69-70, 95-96, 110, 139-40, 180-84, 233, 260-65, 668-75, 708-59, 865-69, 908-15 (3d ed., 1888).

729. Moore, Stuart A., *The History and Law of Fisheries*, pp. xxxviii-xliii, 2-7, 12-14, 19-27, 32-36, 95-108, 178-87, 191-92, 199-202, 227-31, 284-85, 294-97, 374-77 (1903).

730. New Plymouth Colony, *Records* (Nathaniel B. Shurtleff ed.), Vol. V. *Court Orders: 1668-1678*, pp. 62-63, 104, 244-45 (1856).

731. New Plymouth Colony, *Records* (Nathaniel B. Shurtleff ed.), Vol. VI. *Court Orders: 1678-1691*, pp. 18, 56, 102-03, 252-53, 31, 81, 132, 139-40, 218-19 (1856).

732. New Plymouth Colony, *Records* (David Pulsifer ed.), Vol. 11, *Laws: 1623-1682*, pp. 134, 220, 228-29, 233 (1861).

733. Notestein, Relf, Simpson (eds.), *Commons Debates 1621*, pp. 202-04 (1935).

734. Osgood, Herbert L., *The American Colonies in the Seventeenth Century*, Vol. 1, *The Chartered Colonies*, pp. 98-102, 376-79 (1904).

735. Parry, Clive (ed.), 4 *Consolidated Treaty Series*, pp. 127, 149.

736. Parry, Clive (ed.), 11 *Consolidated Treaty Series*, pp. 383, 398, 400.

737. Parry, Clive (ed.), 18 *Consolidated Treaty Series*, pp. 83, 90-91.

738. Pound, Roscoe, "Critique on The Texas Tidelands Case," 3 Baylor L. Rev., pp. 120-29 (1951).

739. Potter, Pitman B., *The Freedom of the Seas in History, Law, and Politics*, pp. 36-37, 48-81 (1924).

740. Preston, Richard A., "Fishing and Plantation," 45 American Historical Rev., pp. 29-43, 183-96, 412-14 (1940).

741. Prowse, D. W., *A History of Newfoundland*, pp. 17-18, 60, 87-90, 167-69, 190-92, 224, 276-77, 311-14, 344-45 (1895).

742. Sabine, Lorenzo, *Report on the Principal Fisheries of the American Seas*, S. Doc. No. 22, 32d Cong., 2d Sess., pp. 181, 184-91, 196-210, 214-15, 227, 269-89, 293-95, 303, 315-24, 354-55 (Jan. 15, 1853).

743. Schultes, Henry, *An Essay on Aquatic Rights; Intended as an Illustration of the Law relative to Fishing*, pp. 2-4 (1811).

744. *Secret Journals of The Acts and Proceedings of Congress*, Vol. I, pp. 328-31, 339, 368-80, 427-31 (1821).

745. *Secret Journals of The Acts and Proceedings of Congress*, Vol. II, pp. 94, 132-51, 157-67, 201-10, 224-33, 256-57 (1820).

746. *Secret Journals of The Acts and Proceedings of Congress*, Vol. III, pp. 150-204, 241-48 (1821).

747. Smith, Herbert Arthur, *Great Britain and the Law of Nations*, Vol. II – *Territory* (Part I), pp. 113, 137-44, 204-05 (1935).

748. Starbuck, Alexander, *History of the American Whale Fishery From Its Earliest Inception to the Year 1876*, pp. 1-18, 44-46, 68-71 (1878).

749. *Statutes of the Realm*, Vol. 7, pp. 515-18 (1698).

750. Stock, Leo Francis, *Proceedings and Debates of the British Parliaments respecting North America*, Vol. I, pp. 81-83 (1924).

751. Stock. Leo Francis, *Proceedings and Debates of the British Parliaments respecting North America*, Vol. II, pp. 4, 352-53 (1927).

752. Stock, Leo Francis, *Proceedings and Debates of the British Parliaments respecting North America*, Vol. III, pp. 10-11, 316-19, 321-23 (1930).

753. Stock, Leo Francis, *Proceedings and Debates of the British Parliaments respecting North America*, Vol. V, pp. 322-23 (1941).

754. Supreme Court of State of New York for Nassau County, *Moyses v. Oyster Bay*, Opinion of Velsor, J., (May 29, 1968).

755. Thorne, Samuel E. (ed.), *Prerogativa Regis*, pp. v, x-xi (1949).

756. Tuttle, Charles Wesley, *Memoir of Captain John Mason, The Founder of New Hampshire*, pp. 1-5, 8-11, 24-27, 64-65, 276-81, 290-93, 302-05, 346-47.

757. Van Tyne, Claude H., "Sovereignty in the American Revolution: An Historical Study," The American Historical Review, Vol. XII, pp. 529-45 (1907).

758. Wharton, Francis (ed.), *The Revolutionary Diplomatic Correspondence of the United States*, Vol. II, pp. 139-45, 740-43 (1889).

759. Wharton, Francis (ed.), *The Revolutionary Diplomatic Correspondence of the United States*, Vol. III, p. 527 (1889).

760. Wharton, Francis (ed.), *The Revolutionary Diplomatic Correspondence of the United States*, Vol. IV, pp. 67-69 (1889).

761. Wharton, Francis (ed.), *The Revolutionary Diplomatic Correspondence of the United States*, Vol. V, pp. 792-97 (1889).

762. Wynne, William, *The Life of Sir Leoline Jenkins*, Vol. 1, pp. 85-99 (1724).

763. Zimmerman, James Fulton, *Impressment of American Seamen*, pp. 86-90.

764. "A copie of the Letter of the Lordes of the Councill, to Mr. Secretary Herbert, myself and others, touching the fisshing of straungers uppon our coast, 1 Feb. 1606" [1606/7]. Lansdowne MSS 142/fol. 375. Caesar Papers. Admiralty. British Museum.

765. Bryce, George, *The Remarkable History of the Hudson's Bay Company*, pp. 12-16 (1900).

766. *Commissioners For Trade and Plantations, Journal of, 1708-9 to 1714-5*, pp. 400-01, 603, 609-11, 615-16 (1925).

767. *Commissioners For Trade and Plantations, Journal of, 1714-5 to 1718*, pp. 38-39 (1924).

768. *Commissioners For Trade and Plantations, Journal of, 1718-1722*, pp. 31-35, 43, 53-54, 90-98, 100, 102, 104-05, 122, 209, 217, 361-62 (1925).

769. *Commissioners For Trade and Plantations, Journal of, 1722-3 to 1728*, pp. 49-53, 124-25 (1928).

770. *Commissioners For Trade and Plantations, Journal of, 1728-9 to 1734*, p. 135 (1928).

771. *Commissioners For Trade and Plantations, Journal of, 1734-5 to 1741*, pp. 332, 334-35, 337 (1930).

772. *Commissioners For Trade and Plantations, Journal of, 1749-50 to 1753*, pp. 36, 147, 203-04, 206-07, 209, 232-33, 253, 257 (1932).

773. *Commissioners For Trade and Plantations, Journal of, 1764-1767*, pp. 19, 26, 30-31, 35, 37-38, 41-42, 56, 76, 118-20, 256, 259, 262-64, 266-67, 270, 272-77, 279-80 (1936).

774. *Commissioners For Trade and Plantations, Journal of, 1768-1775*, pp. 62, 70, 192-93, 219, 227, 308 (1937).

775. Edmundson, Rev. George, *Anglo-Dutch Rivalry During the First Half of the Seventeenth Century*, pp. 3-6, 16-19, 43-48, 116-17, 155-57 (1911).

776. Scott, William Robert, *The Constitution and Finance of English, Scottish and Irish Joint-Stock Companies To 1720*, Vol. I. *The General Development of the Joint-Stock System to 1720*, pp. 105-08, 127-28, 248-50 (1912).

777. Scott, William Robert, *The Constitution and Finance of English, Scottish and Irish Joint-Stock Companies To 1720,* Vol. II. *Companies For Foreign Trade, Colonization, Fishing and Mining,* pp. 41-42, 52-54, 58-59, 64, 69-75, 228-29, 294, 298-306, 308-09, 311-12, 315-18, 323, 363-65, 372-74, 468-70 (1910).

778. Scott, William Robert, *The Constitution and Finance of English, Scottish and Irish Joint-Stock Companies To 1720,* Vol. III. *Water Supply, Postal, Street-Lighting, Manufacturing, Banking, Finance and Insurance Companies. Also Statements Relating to the Crown Finances,* pp. 130-32, 415-17, 449-51 (1911).

779. Elder, John Rawson, *The Royal Fishery Companies of the Seventeenth Century* (1912), pp. 35-53.

780. *Commissioners For Trade and Plantations, Journal of, 1709-15,* p. 236; A Memorial From Mr. Dummer Agent for N. E. relating to Annapolis Royall & the Fishery there &ca. [Transcription for first two paragraphs of document.]

781. *Commissioners For Trade and Plantations, Journal of, 1709-15,* p. 401; Extract of a Memorial from the Marqs. de Monteleone [Translation attached], and Letter to the Earl of Dartmouth in answer to one from his lordship, Whitehall, January 13, 1712/13. [Transcription attached.]

782. *Commissioners For Trade and Plantations, Journal of, 1715-18,* pp. 357-58; Copy of Mr. Attorney General's Report concerning Proceedings about the whale Fishery at New York, July 30, 1713. [Transcription attached.]

783. *Commissioners For Trade and Plantations, Journal of, 1715-18,* p. 38; Extract of a Letter from the Count of Ponchartrain to M. d'Iberville of May 29, 1715 [Translation attached], and Letter from Mr. Secretary Stanhope of May 30, 1715. [Transcription attached.]

784. *Commissioners For Trade and Plantations, Journal of, 1715-18,* p. 39; Letter to Mr. Secretary Stanhope relating to the possession of Newfoundland in the year 1670, dated June 3, 1715. [Transcription attached.]

785. *Commissioners For Trade and Plantations, Journal of, 1715-18,* p. 357; Letter from Brigadier Hunter, Governor of New York, dated January 20, 1718. [Transcription of 2d paragraph, p. 2 through p. 3 of document.]

786. *Commissioners For Trade and Plantations, Journal of, 1768-75,* p. 310; Representation to his Majesty on papers relative to the seal fisheries on the Labrador Island. [Transcription attached.]

787. *Commissioners For Trade and Plantations, Journal of, 1718-22,* p. 43; Letter from Col. Shute, Governor of the Massachusetts Bay, dated January 1, 1718/19 and Letter from Mr. Burchett, Secretary to the Lords of Admiralty, dated February 13, 1718/19 enclosing an Extract of a Letter from Captain Smart of His Majesty's Ship the Squirrel, dated October 22, 1718. [Transcriptions attached.]

788. *Commissioners For Trade and Plantations, Journal of, 1718-22,* p. 50; Letter from Col. Phillips, Governor of the province of Nova Scotia, dated March 24, 1718, together with Extracts of Letters from Captain Doucet,

Lieut. Governor of Annapolis, and from Captain Aldridge. [Transcriptions of Doucet and Aldridge letters attached.]

789. *Commissioners For Trade and Plantations, Journal of, 1718-22,* p. 54; Copy of Col. Dudley, Governor of New England's, Order to Captain Southack, to seize all Ships, etc. fishing contrary to the Treaty of Neutrality made between England and France in 1686. Dated April 18, 1715. [Transcription attached.]

790. *Commissioners For Trade and Plantations, Journal of, 1718-22,* p. 105; Representation upon Mr. Delafaye's letters of the 4th and 14th of August, 1719, with a Memorial of the States of Guipuscoa concerning their Claim of Right to Fish at Newfoundland. [Transcription attached.]

791. *Commissioners For Trade and Plantations, Journal of, 1718-22,* p. 132; Letter from Mr. Cuming giving account of the Fishery at New England, for the last year, dated December 15, 1719. [Transcription attached.]

792. *Commissioners For Trade and Plantations, Journal of, 1718-22,* p. 212; Letter from Mr. Delafaye of September 13, 1720, inclosing (not included) the Petition of Monsr. Johannis Hiriberry, with Several Papers relating to Some Fish taken by Captain Smart from the French at Canceau. [Transcription attached.]

793. *Commissioners For Trade and Plantations, Journal of, 1718-22,* p. 217; Letter from Mr. Archibald Cuming dated October 14, 1720, giving account of the Depredations & Insults committed by the French on his Majesty's Subjects – fishing at Canceau. [Transcription attached.]

794. CO 5/866: Bd. of Trade. Corr. Orig. 1747-1753-x. fol. 67-68, Copy of a Letter from Governor Shirley to the Duke of Bedford, dated Boston, February 18, 1748-9. [Transcription of carryover paragraph, pp. 4-5, and 2d paragraph through signature on p. 12 of document.]

795. *Commissioners For Trade and Plantations, Journal of, 1750-53,* p. 37; Captain Rodney's Answers to Queries contained in His Majesty's Instructions to him, Anno. 1749. [Item 30 only Transcribed.]

796. *Commissioners For Trade and Plantations, Journal of, 1750-53,* p. 147; Petition of Charles Williams of Mahon Merchant, to Gen. Blakeney, Governour and Commander in Chief in the Island Minorca, relating to some coral that may be gathered on the rocks or near the coast of Minorca and praying for a Licence for fishing for same. [Transcription attached.]

797. *Commissioners For Trade and Plantations, Journal of, 1764-67,* p. 30; Report of His Majesty's Advocate, Attorney and Solicitor General dated March 6, 1764, upon the propositions of the court of France respecting the Newfoundland Fishery. [Transcription attached.]

798. *Commissioners For Trade and Plantations, Journal of, 1764-67,* p. 118; Letter from Hugh Pallisser, Esq. Governor of Newfoundland, to the Board, Dated September 1, 1764, containing an Account of his proceedings, and the State of Affairs in the Islands & Territories under his Government. [Transcription attached.]

799. *Commissioners For Trade and Plantations, Journal of, 1764-67,* p. 119; Copy of the Governor's Proclamation requiring the Observance of the Orders for the regulation of the Fishery within the Limits allowed to the French, and Copy of the Governor's Order to the Captains of the King's Ships, relative to French Vessels fishing out of the Limits allowed by Treaty. [Transcription attached.]

800. *Commissioners For Trade and Plantations, Journal of, 1764-67,* p. 166; Letter from Mr. Pallisser, Governor of Newfoundland, dated April 13, 1765, returning the severall Articles of Complaint from the Court of France referred to him, with his Observations upon each of them. [Transcription attached.]

801. *Commissioners For Trade and Plantations, Journal of, 1764-67,* p. 259; Letter from Hugh Pallisser, Esq. Governor of Newfoundland, dated October 30, 1765, relative to the trade and fisheries of his government; Rules, orders and Regulations to be observed on the coast of Labrador, and on the Islands of Anticosty and the Madelines and Regulations relating to the Salmon Fisherys in Newfoundland, dated April 8, 1765; Order concerning Inhabitants of Newfoundland, who deal with the French at St. Pierre and Miquelon. [Transcriptions attached.]

802. *Commissioners For Trade and Plantations, Journal of, 1764-67,* p. 280; Representation to His Majesty upon a Memorial of the proprietors and occupiers of several fishing posts upon the coast of Labrador, complaining of the regulations made by Gov. Pallisser, in respect to the fishery on that coast. [Transcription attached.]

803. *Commissioners For Trade and Plantations, Journal of, 1768-75,* p. 290; Memorandum on the Earl of Rochford's Letter of January 31, 1772. [Transcription attached.]

804. *Commissioners For Trade and Plantations, Journal of, 1764-67,* p. 38; instructions to Hugh Pallisser, Esq. Governor of Newfoundland, Dated April 10, 1764. [Transcription of pp. 276 through carryover paragraph on p. 280; p. 284 ¶9 through p. 285 ¶10; p. 286 ¶12 through p. 288 carryover ¶13; p. 288 ¶15 through p. 290 ¶18; p. 294 ¶25 through p. 297 ¶29, and p. 304 ¶44 of document.]

805. *Commissioners For Trade and Plantations, Journal of, 1764-67,* p. 167; Representation to his Majesty upon the complaints and propositions of the Court of France respecting the Newfoundland fishery, dated April 16, 1765. [Transcription from salutation through the carryover paragraph on p. 371; 2d paragraph p. 387 through carryover paragraph on p. 289, two full paragraphs on p. 391, and from 1st full paragraph p. 292 through signature of document.]

806. *Commissioners For Trade and Plantations, Journal of, 1764-67,* p. 266; Represention to his Majesty upon the state of Newfoundland and the territories dependent on that government, dated March 27, 1766. [Transcription attached.]

807. *Commissioners For Trade and Plantations, Journal of, 1750-53,* p. 257; Representation to his Majesty upon the petition of Charles Williams of Mahon, merchant, for a Patent empowering him to carry on the Coral and Tuney Fishery on the Coasts of the Island of Minorca, dated May 25, 1751. [Transcription attached.]

808. Translation Certificate of Brice M. Clagett re: translation of Maine *et al.*, Exhibits Nos. 781, 783 and 803.

809. *Calendar of State Papers, Colonial, July 1711-June 1712* (Vol. 26), pp. 124-29, 254, 256-57.

810. *Calendar of State Papers, Colonial, Jan. 1719-Feb. 1720* (Vol. 31), pp. 30-31, 61-62, 67-69, 113-15, 187, 211, 219-20, 251-57, 283-84.

811. *Calendar of State Papers, Colonial, March 1720-21* (Vol. 32), pp. 21-27, 132-38, 141-42, 179.

812. *Calendar of State Papers, Colonial, Nov. 1722-23* (Vol. 33), pp. 159-64.

813. *United States* v. *Louisiana, Texas, Mississippi, Alabama and Florida,* No. 10, Original, U.S. Supreme Court, October Term, 1958: Joint Brief for the Defendant States on Common Questions.

814. Letter from John R. Hebert to Paul Weisbord, dated August 2, 1973, and enclosure.

815. Map of New England 16__, by William Reed of Boston. From the Blathwayt Atlas Facsimile John Carter Brown Library 1961. Reproduced in Collotype by The Meriden Gravure Co., 1961.

816. Berry, William, Map of North America Divided into its principal parts where are distinguished the severall states which belong to the English, Spanish, and French. 1680. From A Collection of maps of the world, London, W. Berry, 1689.

817. Map of North America divided into its Principall Parts, 1st English part viz. English Empire containing

ye artick lands near Hudsons Bay, New North & South Wales, New Britain, N. Foundland, N. Scotland, N. England, N. York, N. Jarsey, Pensylvania, Maryland, Virginia, Carolina, Carolinia or Florida California Somer Is. Bahama Is, Jamaica, & ye Cariby Is, Spanish Pt, viz N. Spain pt of ye Antilles, French pt. viz N. France & pt. of ye Cariby Is. 1685?

818. Lea, Philip. A new map of New England, New York, New Jarsey, Pensilvania, Maryland, and Virginia. 1690?

819. Moll, Herman. Map of North America according to ye newest and most exact observations is most humbly dedicated by your lordship's most humble servant. 1715.

820. Moll, Herman. A new map of the north parts of America claimed by France, under ye names of Louisiana, Mississipi, Canada and New France with the adjoyning territories of England and Spain. 1720 (1740 edition).

821. Map of the area of the United States, Canada and part of Mexico. 17__. From a copy in the French BSH given to the library by Carnegie Inst. of Washington, Dept. of Hist. Research 1928.

822. Map of the original thirteen colonies. 1876.

823. Petition of the Government of the State of Queensland To Refer Certain Questions to the Privy Council, with four Annexures and a Further Submission.

824. Petition to Her Majesty The Queen on behalf of the Government of Tasmania.

825. Submission in support of Petition to Her Majesty The Queen on behalf of the Government of Tasmania.

826. Memorandum in support presented by the States of New South Wales, Victoria, South Australia and Western Australia, dated June 5, 1973.

827. Affidavit of Leo D. Barry, Minister of Mines and Energy of the Province of Newfoundland, dated September 21, 1973.

Maine *et al.* Ex. No. 2

Charter of Maine to Gorges and Mason (1622), in 3 Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming The United States of America* 1621 (1909)

1621 This indenture, made the 10th day of August, Anno Dom. 1622, and in the 20th yeare of the reigne of our Sovereigne Lord James, by the grace of God King of England, Scotland, France and Ireland, Defender of the Faith, &c. Between the President and councill of New-England on the one part, and Sir Ferdinando Gorges, of London, Knight, and Captain John Mason, of London, Esquire, on ye other part: *Witnesseth*, that whereas our said Sovereigne Lord King James, for the making of a plantation and establishing a colony or colonyes in ye country called or knowne by ye names of New-England in America, hath, by his Highness' Letters Patents, under the Great Seale of England, bearing date at Westmr. the 3d day of November, in the 18th yeare of his reigne, given, granted and confirmed unto the Right Honorable Lodowick, Duke of Lenox . . . and divers others . . . [1622] and also hath, of his especiall grace, certaine knowledge and meer motion, for him, his heyres and successors; and given, granted and confirmed unto the said President and councill, and their successors, under the reservacons, limitacons and declaracons in the said Letters Patents expressed, all that part or porcon of that country now commonly called New-England wch is situate, lying and being between the latitude of forty and forty-eight degrees northerly latitude, together with the seas and islands lying within one hundred miles of any part of the said coasts of the country aforesaid; and also all the lands, soyle, grounds, havens, ports, rivers, mines, as well royal mines of gold and silver, as other mines, minerals, pearls and pretious stones, woods, quaries, marshes,

waters, fishings, hunting, hawking, fowling, commodities and hereditaments whatsoever, together with all prerogatives, jurisdictions, royaltys, privileges, franchises and preliminaries within any of the said territories and precincts thereof whatsoever. . . .

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Maine *et al.* Ex. No. 12

Grant of "Mariana" to Mason (1621) in XXIX
***New Hampshire State Papers* 19**
(Albert S. Batchellor, ed., Concord, N. H. 1896)

19 A Grant of Cape Anne in New England from the President & Council of New England to John Mason Esqr.

This Indenture made ye Ninth day of March in ye 19th yeare of the Reigne of Our Sovereigne Lord James by ye Grace of God King of England, Scotland, France & Ireland, Defender of the Faith. Betweene ye President & Councell of New England of the one parte and John Mason Gent, and inhabitant of the Citty of London of ye other parte. Witnesseth that whereas Our Said Soveraigne Lord King James for ye makeing a Plantac'on & Establishing a Colony or Colonyes in the Country called or knowne by the Name of New England in America hath by his Highness Letters Patents under the Great Seale of England bearing Date at Westminster the 3d day of Novembr given granted & confirmed unto the Rt Honble Lodwick Lord Duke of Lenox, . . . & divers others . . . And alsoe hath of his especiall Grace certaine knowledge meer motion for him his Heirs & Successors given granted & Confirmed unto the Said President & Councill & their Successors under the Reservac'ons iimitac'ons & Declarac'ons in the Said Letters Pattents expressed. All that parte & Porc'on of the Said Country Now commonly called New England

which is Scituate lying & being betwixt the Latitude of 40. Degrs. & 48 of Northerly Latitude togeather wth the Seas & Islands lying wthin One hundred Miles of any parte of the said Coast of the Country aforesaid. And alsoe all ye Lands Grounds Soyle havens Ports Rivers Mines as well Royall Mines of Gold & Silver as others Mines Mineralls pearles and pretious Stones woods quarreys Marshes Waters fishing hunting hawking fowling Commodities & Herediatam's whatsoever togeather wth all the prerogatives Jurisdic'ons Royaltyes priviledges, Franchises and preheminences wthin any of ye said Territoryes and ye precincts thereof whatsoever. . . .

20 NOW THIS INDENTURE further witnesseth that ye said President and Councell of their full free and Mutuall consent as well to ye end that all the Lands woods, waters, Islands & fishings wth all other the profitts and Comodityes whatsoever to them or any of them and hereafter in These presents menc'oned may be wholy & intirely invested appropriated Severed and Settled in & upon the Said John Mason his heirs and assignes for Evar, as for divers Speciall services for ye advancemt of ye said Plantac'on & other Good causes & considerac'ons them especially thereunto moveing have given granted bargained Sold assigned aliencd Enfeoffed Sett over & confirmed, And by these presents doe give grant bargaine sell assigne alien Enfeoffed Sett over & confirme unto ye said John Mason his heirs and assignes, All that part of the Sea Coast of New England being a great headland or Cape & lying in ye Northermost parts of the Massachusetts Country. . ... [21] togeather alsoe wth all the Seas Isles or Islands adjoyning to any part of ye precincts of the Lands aforesaid or lying wthin 3 Miles of any parte of ye same, as alsoe all ye Lands Soyle Grounds havens Ports Rivers Mines Mineralls pearls & pretious Stones woods Quarreys Marshes Waters Lakes

fishings hunting hawking ffowling Com'odityes & hereditamts whatsoever wth all & Sing'ler their appurtenances togeather wth all prerogatives rights royaltyes jurisdictions priviledges francheses prheminences libertyes Marine power as alsoe ye Escheats and casualtyes thereof, ...

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Maine *et al.* Ex. No. 13

Grant of New Hampshire to Mason (1629), in 4 Thorpe 2433.

2433 This Indenture made ye Seaventh day of Novembr Anno Dom'y 1629 & in ye ffifth yeare of ye Reigne of our Soveraigne Lord Charles by ye Grace of God King of England Scotland ffrance & Ireland Defender of the ffaith &c Between ye President & Councell of new England on the one partie & Capt John Mason of London Esqr on ye other partie Witnesseth yt whereas our late Soveraigne Lord of ffaimous Memory King James for ye makeing a Plantation & establishing of a Colony or Colonyes in the Countrey called or knowen by ye name of New England in America did by his highness letters patents under ye greate Seale of England bearing date att Westminster ye third day of Novembr in ye Eighteenth yeare of his Reigne give grant & confirme unto ye Right honble Lodowick Duke of Lenox . . . & divers others . . . and also did of his especiall Grace certaine knowledge and meer motion for him his heyres & Successors give grant & confirme unto ye said President & Councell & their Successors under ye reservac'ons limitac'ons & declarac'ons in ye
2434 sd letters patents expressed. All yt part & porc'on of yt Countrey now commonly called New England wch is scittuate lying & being between ye latitude of fforty degrees & ffourty Eight of Northerly latitude together with ye

Seas & Islands lying wthin one hundred miles of any part of ye sd Coaste of ye Countrey aforesd & also all ye lands Soyle grounds havens ports rivers mines as well Royall mignes of Gold & Silver as other mines mineralls pearls & pretious Stones woods quarryes marshes waters ffishings hunting hawking fowling commodityes & hereditaments whatsoever together wth all prerogatives Jurisdicc'ons Royaltyes priviledges franchises & preheminences within any of ye sd Territoryes & ye precincts thereof whatsoever. . . .

* * *

Maine *et al.* Ex. No. 141

Proprietary Charter and Grant to Caecilius Calvert, Lord Baltimore (1632), in 3 Thorpe 1677

1677 Charles, by the Grace of God, of England, Scotland, France, and Ireland, king, Defender of the Faith, &c. To all to whom these Presents come, Greeting.

* * *

1678 IV. Also We do grant and likewise Confirm unto the said Baron of Baltimore, his Heirs, and Assigns, all Islands and Inlets within the Limits aforesaid, all and singular the Islands, and Islets, from the Eastern Shore of the aforesaid Region, towards the East, which had been, or shall be formed in the Sea, situate within Ten marine Leagues from the said shore; with all and singular the Ports, Harbours, Bays, Rivers, and Straits belonging to the Region or Islands aforesaid, and all the Soil, Plains, Woods, Marshes, Lakes, Rivers, Bays, and Straits, situate, or being within the Metes, Bounds, and Limits aforesaid, with the Fishings of every kind of Fish, as well of Whales, Sturgeons, and other royal Fish, as of other Fish, in the Sea, Bays, Straits, or Rivers, within the Premises, and the fish there taken;

And moreover all Veins, Mines, and Quarries, as well opened as hidden, already found, or that shall be found within the Region, Islands, or Limits aforesaid, of Gold, Silver, Gems, and precious Stones, and any other whatsoever, whether they be of Stones, or Metals, or of any other Thing, or Matter whatsoever; . . . with all, and
1679 singular such, and as ample Rights, Jurisdictions, Privileges, Prerogatives, Royalties, Liberties, Immunities, and royal Rights, and temporal Franchises whatsoever, as well by Sea as by Land, within the Region, Islands, Islets, and Limits aforesaid, to be had, exercised, used, and enjoyed, as any Bishop of Durham, within the Bishoprick or County Palatine of Durham, in our Kingdom of England, ever heretofore hath had, held, used, or enjoyed, or of right could, or ought to have, hold, use, or enjoy. . . .

* * *

Maine *et al.* Ex. No. 170

"Territorial Waters Jurisdiction Act"
41 & 42 Vict. Ch. 73 (1878)

579 CHAPTER 73.

An Act to regulate the Law relating to the Trial of Offences committed on the Sea within a certain distance of the Coasts of Her Majesty's Dominions.

[16th August 1878.]

WHEREAS the rightful jurisdiction of Her Majesty, her heirs and successors, extends and has always extended over the open seas adjacent to the coasts of the United Kingdom and of all other parts of Her Majesty's dominions to such a distance as is necessary for the defence and security of such dominions:

And whereas it is expedient that all offences committed on the open sea within a certain distance of the coasts of the United Kingdom and of all other parts of Her Majesty's dominions, by whomsoever committed, should be dealt with according to law:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited as the Territorial Waters Jurisdiction Act, 1878.

2. An offence committed by a person, whether he is or is not a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried and punished accordingly.

* * *

Maine *et al.* Ex. No. 172

Baker, Sir Sherston, *The Office of Vice-Admiral of the Coast* (1844)

* * *

124 . . . Some doubts, however, having arisen with respect to the jurisdiction of this court, the limits and extent thereof were at length fixed and ascertained by Statute, in 1681, cap. 82, the tenor whereof follows: –

Our Sovereign Lord, considering that the clearing and establishing the jurisdiction of the High Admiral of this kingdom will greatly tend to the advancement and encouragement of trade and navigation; therefore His Majesty, with advice and consent of the Estates of Parliament, doth ratify and approve the fifteenth Act of the twelfth parliament of King James the Sixth, in the whole heads, clauses, and articles of the same; and decerns and declares the High Court of Admiralty to be a sovereign judicature in itself, and of its own nature to import summar execution. And statutes and declares, That the said High Admiral, as he is His Majesty's lieutenant and justice-general upon the seas, and in all ports, harbours, or creeks of the same, and upon fresh waters or navigable rivers below the first bridges, or within the floodmarks, so far as the same does or can at any time extend; so the said High Admiral hath the sole privilege and jurisdiction in all maritime and seafaring causes, foreign and domestic, whether civil or criminal, whatever within this realm, and over all persons as they are concerned in the same: . . . .

* * *

Maine *et al.* Ex. No. 174

2 Blackstone, Sir William, *Commentaries on the Laws of England* Vol. 2 (1765)

* * *

261 [I]n case a new island rise in the *sea*, though the civil law gives it to the first occupant; yet ours gives it to the king. And as to lands gained from the sea, either
262 by *alluvion*, by the washing up of land and earth, so as in time to make *terra firma;* or by *dereliction*, as when the sea shrinks back below the usual watermark; in the these cases the law is held to be, that if this gain be by

little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For *de minimis non curat lex:* and, besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible charge or loss. But, if the alluvion or dereliction be sudden and considerable, in this case it belongs to the king: for, as the king is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil, when the water has left it dry. . . .

* * *

Maine *et al.* Ex. No. 175

Boroughs, Sir John, *The Soveraignty of the British Seas* (1633) (1920 ed.)

43 That Princes may have an exclusive property in the Soveraigntie of the severall parts of the Sea, and in the passage fishing & shores thereof, is so evidently true by way of fact, as no man that is not desperately impudent can deny it.

* * *

45 . . . And therefore the question being not as yet resolved amongst themselves, it were strange to thinke that Princes in the meane time will relinquish the possession of those Royalties which they and their Ancestors have held beyond all memory, without a judgement first agreed upon and affirmed in the case. And for his sacred Majesty our dread Soveraigne Lord the King, such is his cleare and indubitable right to the Superiority of the Seas of *England* derived and confirmed upon him by immemorable

prescription, and continued in possession even untill this very yeare 1633, that the hearts and consciences of all just men must necessarily subscribe to the evident truth thereof.

* * *

90 A child borne upon the Kings Seas is not an Alien by the common law.

* * *

92 By all which presidents it is manifest that by the common Law of the land the King is proprietory Lord of our seas; that the seas of *England* are under the legeance of the king; that the king is the soveraigne conservator of the peace as well upon the sea as land; That not onely things floating on the superficies of the water but such as lye upon the soile or ground thereof belong properly unto the king, whereupon I conclude, That *Rex Maris imperio Dominio et fundo possidet.*

* * *

Maine *et al.* Ex. No. 176

"De Superiorite Maris Angliae & jure offici Admirallatus in eodem," translated in Boroughs, Sir John, *The Soveraignty of the British Seas* (1633) (1651 ed.)[1]

55 "To our Lords Auditors deputed by the Kings of *England* & of *France* to redresse the damages done to the people of their Kingdoms and of other Territories subject to their Dominions by sea and by land, in time of peace and truce.

"The Procurators of the Prelates, Nobles, and Admirall of the sea of *England* and of the Comminalties of Cities and Townes and of Merchants, Marriners, Messengers, Pilgrims, and of all other of the said Kingdome of *England* and the Territories subject to the Dominions of the sayd King of England, and of other places, as of the Seacoasts of *Genoa, Cataloigna, Spaine, Almaigne, Zealand, Holland, Freezland, Denmarke* and *Norway* and of divers other places of the Empire,
56 doe shew, That whereas the Kings of *England,* by reason of the sayd Kingdome, from time whereof there is no memory to the contrary, have been in peaceable possession of the Dominion of the Sea of England and of the Isles being in the same, in making and establishing Lawes and Statutes and restraints of Armes and of Ships otherwise furnished then to Ships of merchandize appertaineth, and in taking suretie and affording safeguard in all cases where need shall be, in ordering of all other things necessary for maintaining of Peace Right, and Equity amongst all manner of people, as well of other Dominions as of their owne, passing through the said Seas, and the Soveraign guard thereof, and in doing Justice, Right, and Law, according to the said Lawes Ordinances, and Restraints, and in all other things which may appertaine to the exercise of soveraigne dominion in the places aforesayd. And *A. de B.* Admirall of the Sea deputed by the King of *England,* and all other Admiralls ordained by the sayd King of *England,* had been in peaceable possession of the soveraigne guard, with the cognizance of Justice, and

all other the appurtenances aforesayd, except in case of Appeale, and of complaint made of them to their Soveraignes the Kings of *England* in default of Justice and for evill Judgement, and especially in making Restraints, doing of Justice,
57 and taking surety of the peace of all manner of people using Armes in the said Sea, or carrying Ships otherwise furnished and set forth then to Merchants Ships appertaineth, and in all other points where a man may have reasonable cause to suspect them of Robbery, or of other misdemeanours. And whereas the Masters of the ships of the sayd Kingdome of *England*, in the absence of the sayd Admirall, have been in peaceable possession of taking Cognizance and judging all actions done in the sayd Sea, betweene all manner of people according to the said lawes, Statutes, restraints, and customes. And whereas in the said first Article of confederation lately made betweene the said kings in the treatie upon the last peace at *Paris* are comprised the words which follow in a Schedule annexed to these presents:

" 'First it is estreated and accorded betweene us and the messengers and Procurators aforesaid in the names of the said Kings. That the said Kings shall from this time forward be one to the other good true and loyall friends, and ayding against all men (save the Church of *Rome*)
58 in such manner as if any one or more, whatsoever they be, would disinherit hinder or molest the said kings in the Franchises, liberties, priviledges, rights, dueties, customes of them and of their kingdomes, they shall bee good and loyall friends, and ayding against all men that may live

and die, to defend keepe and maintaine the Franchises, liberties, priviledges, rights, duties, and customes abovesaid, except, to the King of *England*, Mounsieur *John Duke* of *Brabant* in *Brabant* and his heires descended of him, and of the daughter of the King of *England*, and except, to our foresaid Lord the King of *France*, the excellent Prince *Mounsieur Aubart* King of *Almaigne*, and *Mounsieur John* Earle of *Anhault* in *Anhault*, and that the one shall not be of Counsell or ayding, where the other may lose life, member, estate, or temporal honour,' –

"*Mounsieur Reyner Grimbald* master of the said Navy of the said King of *France*, who names himselfe Admirall of the said Sea, deputed by his Lord aforesaid in his warre against the *Flemmings*, after the said confederation made & established and against the forme and force of the said confederation and the intention of them that made it, wrongfully assumed the office of the admiraltie in the said Sea of *England*, by the commission of the King of *France*, and used the same one year
59 & more, taking the people and Merchants of the kingdome of *England*, and of other places, passing through the said Sea with their goods, & delivered the people so taken to the prison of the said Lord the King of *France*. [and their goods and merchandise to the receivers of the said King of *France*] in the Ports of his said kingdome, as to him forefeited and accrewing. And the taking and detayning of the said people with their said goods and Merchandise, as also his said judgement, and award [he] hath justified before

the Lords Auditors in writing by vertue of the authoritie of his said commission of the Admiraltie aforesaid by himselfe usurped, and during a restraint generally made by the King of *England* by reason of his power and according to the forme of the third article of the confederation aforesaid, which conteineth the words underwritten, requiring that he might be acquitted and absolved of the same, to the great dammage and prejudice of the King of *England*, the Prelates Nobles and others above named.

"Wherefore the said procurators, in the names of their said Lords, doe pray your Lordships Auditors aforesaid that you cause due and speedie deliverie of the said people with their goods and Merchandise so taken and detained to be made to the Admirall of the said King of *England* to whom the Cognizance of the same of right appertaineth (as is before expressed); So that, without the disturbance of you or any other, hee may take Cognizance thereof and doe that which appertaineth to his office aforesaid. And the said *Mounsieur Reyner Grimbald* bee condemned and constrained to make satisfaction to all the said parties dampnifyed, so far forth as hee shall be able, and in his default his said Lord the King of *France*, by whom he was deputed in the said Office; And that, after due satisfaction made to the parties dampnified, the said *Mounsieur Reyner* bee so duly punished for the violation of the sayd confederation, that his punishment may bee an example to others in time to come."

[1] The proceedings referred to give only the complaint submitted by the procurators for the countries mentioned. The Roll does not show that any decision was given. Selden, *Mare Clausum*, ii. 27, suggests that it was "a matter of such moment that it was thought more convenient to make an end by agreement." The document appears to be only a draft, but even then it is valuable as showing the attitude England took up in the dispute.

* * *

Maine *et al.* Ex. No. 182

Coke, Edward, *The First Part of the Institutes of the Lawes of England* (London 1628)

Hors du Roialme. (id est) extra Regnum, as much to say, as out of the power of the King of England, as of his Crowne of England: for if a man be upon the Sea of England, he is within the Kingdome or Realm of England, and within the ligeance of the King of England, as of his Crowne of England. And yet altum mare is out of the jurisdiction of the common Law, and within the jurisdiction of the Lord Admirall, whose jurisdiction is verie ancient, and long before the raign of Edward the third, as some have supposed, as may appeare by the Laws of Oleron, (so called for that they were made by King Richard the first when he was there) that there had beene then an Admirall time out of mind, and by many other ancient records in the raignes of Henry the third, Edward the first, and Edward the second, is most manifest.

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Maine *et al.* Ex. No. 183

Coke, Edward, *The Fourth Part of the Institutes of the Lawes of England* (London 1644)

* * *

142 Now for the great prerogative and interest that the King of England hath in the Seas of England, and for the antiquity of the Court of the Admiralty of England, and of the name of the Admirall, we have seen an ancient and a notable Record, intituled, De superioritate maris Angliae & jure officii Admiralitatis in eodem. So much whereof as we finde in Archivis regis, we will transcribe de verbo in verbum, as it is in the Record it self.

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Maine *et al.* Ex. No. 184

Coke, Sir John, "*Propositions for Fishing*" (Manuscript) (1633) (first page only).

The greatnesse & glorie of this kingdom of great Brittaine consisteth not so much in the extent of his Mte territories by Land: as in the Soveraintie and command of the Seas. This command is in peace, over trade and fishing: and for warre in the power of his Mte Navie to incounter the sea-forces of anie foren prince. This power heretofore had no opposite but Spaine. Now the French pretend to question it: & must in time bee kept in order. For trade & fishing wee have given so much way to the Lowcontriemen of Late years, that we have more cause to bee ielous of them, then of the Spanish or the French. The fishing wch is the businesse now in hand hath three parts. The first in the west & norwest discoveries: the second in the north/eas: The third on his Mte coasts. The new discoveries of Virginia, New-England, New Scotland

and the rest, wch of late years imploied above 300 saile of our ships: have been often interrupted by the French: & now of late by the Dutch: . . . .

* * *

Maine *et al.* Ex. No. 185

4 Comyns, *Digest of The Laws of England* (1776 ed.)

(B) PREROGATIVE AS TO FOREIGN NATIONS.

(B. I.) Sovereignty of the Sea.

388 All the King's Prerogatives relate to Foreign States, or to his own Subjects.

The King and his Progenitors have at all Times been Lords of the Sea. 2 *Rol. 168. l. 45. Vide Navigation.*

And therefore, the Dominion of the whole Sea which surrounds *England* belongs to the King. 1 *Rol. 528. l. 15.*

And this Dominion extends to both Shores of the Sea. (2 *Rol. 168. l. 45.*)

And the Ligeance or Dominion of the Sea belongs to the King, as to his Crown of *England.* 2 *Rol. 170. l. 42.*

And therefore, the King gives Licence to the Men of *Zealand, &c.* to fish in his Sea. 2 *Rol. 170. l. 30.*

To whom the Property and Soil of the Sea belongs, *Vide Navigation,* (A.–B.) – To whom, the Fishery, *Vide Post,* (D. 50.)

* * *

Maine *et al.* Ex. No. 186

Elder, John Rawson, *The Royal Fishery Companies of the Seventeenth Century* (1912)

4 As is usually the case, it was the increased importance of Holland and particularly her growing maritime power which brought her into conflict with other nations. So long as the Low Countries had constituted merely a small province of the great Spanish Empire, both English and Scoch had been content to grant Dutch fishermen their protection and had willingly allowed them to fish in British waters, upon their acknowledging the sovereignty of the English king in the seas about Britain, and purchasing licenses permitting them to fish in these seas. The English kings had since the time of Edward III. definitely asserted their claim to sovereignty in the seas lying about the coasts of their kingdom. Edward III. issued a proclamation making this claim, and had his right admitted by the Treaty of Paris, 1360; this same right was upheld by Henry V., Henry VI., and Henry VII.

That this claim to sovereignty was much more than a mere idle assertion is clear from the fact that in the reign of Mary when the fishermen of the Low Countries wished to seek new fishing grounds, there was granted to King Philip's subjects in Flanders a twenty-one years' lease of the fishings about the North Coast of Ireland, this lease being granted in consideration of a fine and £1000 paid annually to Sir Edward Fitton, Treasurer for Ireland. A
5 like privilege to fish in the Irish seas was granted under similar conditions by the same queen to "The Company of the old Hans." Foreigners desirous of fishing in English waters were, at this time, regularly granted licenses at Scarborough Castle.

* * *

6 No foreigners had fished off the island of Lewis till 1594, when the Hollanders began to fish in the seas about the island by virtue of a license, which kept them, however, at a distance of twenty-eight miles from the shore.

* * *

9 It had always been understood that for a certain distance from the shore the fishing was reserved for native fishermen; the exact distance had varied considerably with varying conditions. The French, for example, by a treaty made in the reign of Henry IV. of France, with regard to fishing off the coast of England, had accepted a limitation both as to time and place. They agreed not to fish "between Autumn and the Calends of January," and only throughout that part of the sea "which is bounded on this side by the Ports of Scarborough and Southampton, and on the other side by the coast of Flanders and the mouth of the river Seine."

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Maine *et al.* Ex. No. 189

Fulton, Thomas Wemyss, *The Sovereignty of the Sea* (1911)

* * *

369 There was good reason for the king's eulogy of Selden's treatise. From the point of view of his policy nothing that the pen can do could have been better done. It is an elaborate and masterly exposition of the case for the sovereignty of the crown of England in the British seas, which throws into the shade all the other numerous works which were written on that side of the question. One of the most eminent lawyers of his time, a scholar, an antiquary, an historian, the author brought to his task a keen

intellect, an immense erudition, and the ability of dispos-
370 ing his material and arguments to the best advantage. In learning at least he far surpassed Grotius, and he was not inferior to his illustrious contemporary in ingenuity of reasoning. It was Selden's misfortune that the cause he championed was moribund, and opposed to the growing spirit of freedom throughout the world. At the same time it must be said that, apart from its extreme doctrines as to the sovereignty of England in the seas, it more correctly represented what are now the admitted principles as to the appropriation of the adjacent sea than did most of the works written on the other side, not excepting even those of Grotius.

* * *

373 The maritime sovereignty claimed by Selden for the kings of England was of the most absolute kind. Speaking particularly of the eastern and southern parts of the English sea, lying between England and the shores of France and Germany, – in which Charles was especially interested, – he declared that the powers exercised by the kings of England from the time of the Norman Conquest were as follows: (1) the custody, government, and admiralty, as if it were a territory or province of the king; (2) leave of passage granted to foreigners at their request; (3) liberty of fishing in them conceded to foreigners, and protection afforded to their fishermen; (4) the prescribing of laws and limits to foreigners in hostility with one another as to the taking of prizes. It is to be noted that Selden in expounding his case expressly rejected the principle of the mid-line, the limits laid down by the Italian writers, and those prescribed by King James in defining the King's Chambers; and he disclaimed the arguments used by the English commissioners at the Bremen Conference in 1602, as to the freedom of the seas, as being

374 contrary to English rights. He concludes his famous book in the following words: "It is certainly true, according to the mass of evidence set forth above, that the very shores or ports of the neighbouring sovereigns on the other side of the sea are the bounds of the maritime dominion of Britain, to the southwards and eastwards; but in the open and vast ocean to the north and west they are to be placed at the farthest extent of the most spacious seas which are possessed by the English, Scots, and Irish."

It may be added that *Mare Clausum* became in a sense a law-book, an authoritative work to which eminent lawyers, as Lord Chief-Justice Hale and Hargrave, appealed as proving the existence and the legality of the rights of the crown of England to the dominion of the British seas. Even as late as the year 1830 this doctrine held its place in certain recognised treatises on the law of England, together with Selden's definition of the extent of those seas.

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Maine *et al.* Ex. No. 190

Galloway, Robert L., *A History of Coal Mining in Great Britain* (London 1882)

* * *

55 An Egyptian wheel was fitted up about or before the year 1600, by Sir George Bruce, to re-open the colliery of Culross, in Perthshire, which had been abandoned for some time. Sir George was famed for his knowledge and great skill in machinery, "such like," it is stated, "as no other man has in these days," and he made his colliery at Culross the wonder of the district, the workings being carried to a distance of a mile underearth, the Firth of Forth. The colliery had two pits, or shafts, one of which

was situated in a little artificial island on the fore-shore near low-water mark. The other pit was on the edge of the shore, and here was placed the engine which drew the
56 water from the mine. It was driven by three horses, and consisted of an endless chain with thirty-six buckets attached to it, of which eighteen were continually descending empty, and eighteen ascending full of water. The buckets filled themselves in the well at the bottom of the pit, and emptied themselves into a trough at the top as they passed over the axle-tree.

Tradition records that King James paid a visit to Sir George Bruce in 1617, and went to see his wonderful colliery. The royal party entered the mine by the shaft on the land, and in returning were brought up the other shaft on the island. The tide happened to be high at the time, and the King, not knowing the peculiar arrangement of the mine, on arriving at the top and seeing himself surrounded by the waves, at once suspected a plot on his life, and shouted "Treason!" His host, however, instantly explained the matter, pointing to a beautiful pinnace waiting to take the party on shore, and the King's equanimity was restored.

* * *

94 Spedding entered upon the management of the pits at Whitehaven about the year 1718.

* * *

. . . Here he proposed to Sir James Lowther to sink a pit and erect a steam-engine which would drain many hundred acres of coal under the land and an unknown extent under the sea.

The sinking at Saltom was the most remarkable colliery
95 enterprise of its day. It was commenced in 1729 within twenty yards of high-water mark.

* * *

Maine *et al.* Ex. No. 196

Hull, Edward, *The Coal Fields of Great Britain* (London 1881)

* * *

34 Sir John Clerk, in a letter to a friend, written in 1739, gives an interesting account of the collieries of Whitehaven. The coal-beds, even at that time, were worked far under the sea, so that, as the writer observes, Sir James's riches in part swim over his head, for ships pass daily above the very ground where his colliers work.

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Maine *et al.* Ex No. 197

Malynes, Gerard, *Lex Mercatoria or the Ancient Law-Merchant* (London 1622)

* * *

186 *Bartolus* doth in his opinion allow for princes and people at the sea-side *Centum milliaria,* which is one hundreth leagues of sea from their coast, if they extend their protection so farre, called by them *Districtus maris et territorium,* which is most plaine in those seas where the Isles of Garnesey and Iarnesey are so sensible and visible to the realme of England, or where there are such rockes or emi-
187 nent marks as the Washes at the West seas thereof; to which purpose *Paulus* a renowned Civilian saieth, That it is not needfull for him who would possesse himselfe of any land,

to go about, and tread over the same; but it is sufficient to enter in upon any part thereof, with a mind to possesse all the rest thereof, even to the due marches, to be made apparant by the instruments of Geometricians. And the like may be designed upon the seas, notwithstanding the soliditie of the one, and the continuall flowing too and fro of the other.

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Maine *et al.* Ex. No. 198

1 Marsden, Reginald, *Documents Relating to Law and Custom of the Sea* (1915-1916)

* * *

88 The King to his well-beloved and trusty Robert de Herle and Robert Belknap, Greeting. Although we appointed you, and certain others of our lieges, to hear and determine according to the law and custom of our realm divers trespasses and felonies committed and perpetrated, as it was said, by certain of our subjects and others, upon the sea, against certain merchants, as well English as foreign, who were in a ship of John Goldbetere and John Saleman, of England, and Jakemart, a Flemyng, merchants, of which ship Christian Roos of Sluys was master, being loaded at Nantes, in Brittany, with divers goods and merchandises, to the value of 20,000*l.*, to be taken from thence to Flanders; Nevertheless because, after further consideration of the matter by us and our council, it appears that, according to the law and custom of our realm, felonies, trespasses, or injuries done upon the sea ought not to be dealt with or determined before our Justices at the common law, but before our Admirals according to the maritime law; Therefore we, desiring to do what is just, have caused our commission so made to you [as

aforesaid] to be recalled; and we command that you wholly abstain from executing in any way our commission so made, or to be made, to you, and that you in no way, and by no means intermeddle therewith. In witness, &c.

* * *

Maine *et al.* Ex. No. 199

2 Marsden, Reginald, *Documents Relating to Law and Custom of the Sea* (1915-1916)

231 *1713.* Hedges to Burchett, as to the limits of the British seas. — *Adm. Sec. In Letters 3668,* f. 146.

My Lords of the Admiralty having been pleased to require my opinion, as soon as conveniently may be, how far the Channel and North Seas are commonly known or reputed to extend, I lay my thoughts before them without delay, with all I can recollect concerning the whole extent of the British seas, as briefly as the matter will admit.

1. I take it, without any doubt, that the four seas, viz. East, South, West, and North are within her Majesty's sea dominions, as queen of Great Britain.

2. That the East and South parts of this dominion extend to the opposite shores; and, if a line be drawn from Berwick to the Naes in Norway, and another from Cape Finisterre to Cape Clear, or the most Southern point in Ireland, I conceive the space within those lines has been always reputed a part of the British seas; but I can't say this is the utmost extent of them outwards, there being some opinions that carry it further.

3. If a line be drawn from the North Foreland to Calis, and another from the islands of Scilly to Ushant, I think the space between those lines and the opposite shores describes that part of the British seas called the Channel; and the other space from the Channel to the Naes is also distinguished by the name of the German Ocean.

4. If the imaginary line from the Naes to Berwick be continued to Carlisle, and thence Westward by the coasts of Scotland and Ireland, in about 56 degrees North, it
232 may be a proper distinguishing boundary of the North Seas on this side, which are extended Northward to the coasts of Norway, taking in the Hebrades, Orchades, and all the islands, even to [Iceland].

5. To the Westward the British seas take in St. George's Channel, and as far beyond Ireland to the West as has been accounted and reputed to belong to the British seas, or according to the extent of possession thereof. Some will have it reach to Newfoundland or North America, but I do not find there is any certain point of boundary fixt by the Trinity House, or any writers of good authority in this particular.

6. All nations pretend to dominion at sea on their own coasts; some extend it to no further than they can reach, some sixty miles, some a hundred or more, with regard to the seas which wash their borders, or opposite shores. But no rule can be drawn from thence, since their seas are narrower, and can't be compared with those of Brittain, which has no opposite shores to the Westward but in the British territories; and if the British dominion may be extended as far from the Irish shores to the Westward in any proportion that the Ocean bears to

the Mediterranean, the Gulf of Venice, the Euxine, Sound, Belt, or White Sea, which are possessed by several princes and states, who retain those respective dominions, the Queen of Britain may take in many more leagues than any of them do miles; or if they claim by virtue of being possessed of opposite shores, her Majesty may, by the same rule, claim the Western Ocean beyond Ireland.

Lastly, if her Majesty may extend her dominion as far Westward as she does North and South from the shoare, it may be reasonably asserted that the ship taken in the
233 latitude of 53 degrees North, and about eighty or a hundred leagues West North West of Greenland was taken in the British Seas.

Which, nevertheless, I submit to the better judgement of those who have a more competent knowledge of the boundaries of sea dominion; though I crave leave to observe that the British sovereignty has in all ages been asserted to the utmost extent of those seas which have been possessed by the Brittains and Irish in the vast oceans of the North and West.[1]

[1] In 1699 Hedges made a long report upon the same subject with reference to a sloop captured by the French 25 leagues S.W. of Ushant. It was claimed that the capture was not made within the British seas, within the meaning of those words in the agreement for cessation of hostilities. The substance of the report is that, according to English authorities, the British seas extend to the coast of Spain, and that Belle Isle, Oleron, and other islands in the Bay of Biscay are within the British seas; that in the second treaty with the Dutch, as to the salute, the same limit was mentioned; and he quotes Solinus, Pliny, and Pomponius Mela, and certain French writers. The claim of England to these seas he traces to the time when the kings of England were Dukes of Normandy and Aquitaine. He suggests a line drawn from the north of Ireland to Finisterre (Ushant), and from thence 'along the coast

of Spain and France in the Bay of Aquitaine, and in the Channel on the coast of France and the Low Countries over against Britain,' as being the boundary. The British seas are not, he says, confined to the King's Chambers, as defined by James' proclamation (vol. I, p. 357), the only purpose of which was to describe the waters in which fighting between the Dutch and Spaniards would not be allowed. He refers to two reports of the Trinity House; one of 1668 (see *Add. MSS.* 30221, f. 19), stating that the English Channel is entered when Scilly is brought N.N.W.; the other of 1671, that the British seas extend to the North Cape (Finisterre or Cape Ortegal). The treaty of peace of 1667 between France and England, he says, assumes that the British seas extend to Cape St. Vincent. . . .

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Maine *et al.* Ex. No. 202

Medows, Sir Philip, ***Observations Concerning the Dominion and Sovereignty of the Seas*** **(London 1689)**

* * *

42 And yet 'tis a thing undoubted, and never brought into Question by any; but that every Prince, whose Country adjoyns to the Sea, and whose Shores are indented with Bayes, Creeks, Havens, and Rivers, has some portion of the Sea belonging to him in property, as an accession of the Land, or appendant to it, or rather incorporated
43 with it, like Veins and Arteries, integral Parts of the same Body.

* * *

If there be no certain Standard in Nature, whereby to ascertain the precise Boundaries of that peculiar Marine Territory, I am now speaking to, which belongs to every Prince in Right of his Land; yet, by Treaty and Agreement, they may easily be reduced to certainty. For, as to the Judgment and Opinion of private Persons, we cannot fetch from thence any true measure; for though they

all agree unanimously, that there is something due of Right, yet they vary in the *Quantum*, or How much. *Baldus* reckons One hundred Miles at Sea, as the District of the adjacent Land. *Bodin* affirms it for a received Law amongst Nations, That the Prince, whose Country abuts upon the Sea, should have Sixty Miles Jurisdiction from the Shore, and that it was so adjudged in the Case of the Duke of *Savoy*. Another Doctor will tell us, That so much of the Sea appertains to the Land, as far as a Man can see from Shore in a fair day. But this will not serve our turn: For if a Man may see from *Dover* to *Calais*, I suppose the like may be done from *Calais* to *Dover*, and whose shall the Sea be betwixt? Therefore, the surest way is, to prescribe the Limits of Fishing betwixt Neighbouring Nations by Contract, and not by the less certain measure of Territory. For if no Bounds be fixed, how many Inconveniences, and what a licentious Extravagance, may such a Liberty run into? Why may not the *Dutch*, as formerly they have done, dredge for Oysters upon the Coasts of *Essex*, within the Fisheries of private persons, and within Streams and Waters appertaining to particular Mannors, by Grants from the Crown?. . .

It was anciently Covenanted betwixt the Crown of *Scotland*, and the *Netherlands*, that they should not Fish within Fourscore Miles from the *Scottish* Shoars. . . .

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Maine *et al.* Ex. No. 204

Needham, Marchamont, *Of the Dominion or, Ownership of the Sea* (translation of John Selden, *Mare Clausum*) (London 1652)

* * *

141 Lastly, that which is objected, touching the vast magnitude of the Sea, and its inexhaustible abundance, is of very little weight here. Suppose it bee inexhaustible, so that hee which shall appropriate it to himself, can receiv no dammage by other men's using it, what more prejudice is this to the right of Ownership or Dominion, then it is to the Owner of a Fire or Candle, that another man's should bee lighted by his? Is hee therefore less Master of his own Fire or Candle? But truly wee often see, that the Sea it self, by reason of other men's Fishing, Navigation, and Commerce, becom's the wors for him that own's it, and others that enjoie it in his right; So that less profit ariseth, then might otherwise bee received thereby. Which more evidently appear's in the use of those Seas, which produce Pearls, Coral, and other things of that kinde. Yea, the plentie of such seas is lessned every hour, no otherwise then that of Mines of Metal, Quarries of Stone, or of Gardens, when their Treasures and Fruits are taken away. And it is a custom of the *Mahometans* (who are
142 very great and Potent Nations) to estimate their seas no less upon this accompt, then by the Revenue either of Fishing or Navigation; as wee may see in that their *fals Prophet*, when speaking of the most holy God hee *saith*, *It is hee that hath prepared the Sea for your use, that thence yee may take fresh Food* (and use Fishing) *and also that out of it yee may draw ornaments to adorn you.* *Mahomet Ben Achmed*, the best Expositor of the *Alcoran*,

for the chief Commodity of the Sea. From whence also it is, that a special Licence to search for *Coral*, hath somtimes been granted in Leagues made by the grand Seignieur, it is observed before. Yes, and *Pliny* speaking, especially of the more Easterly Seas, saith; *It had been counted a small matter, that men swallowed whole Seas into their throats, if both men and women also did not wear them up and down upon their hands, ears, heads, and all parts of the Body.* But it is well known to us, that precious Stones and Pearls, are very often found also in the Western Seas, and hee tell's us, they were frequently found in antient time. Moreover (saith hee) *It is certain that in* Britain *they are produced, though small and ill colored* (as wee all see at this day) *forasmuch as* Julius Caesar *would have it understood, that the breast-plate which hee consecrated to* Venus *in her Temple, was made of British Pearl.* Yea, it is written by many, and testified by *Suetonius*, that *Caesar* went to *Britain* in hope of Pearls. It is obvious therefore to every man, that the gain of such a Voiage into *Britain*, may bee lessned, and that the abundance either of Pearls themselvs, or of those shellfishes, which produce them, may through a promiscuous
143 and common use of the Sea, bee diminished in any Sea whatsoever. Where then is that inexhaustible abundance of Commodities in the sea, which cannot bee impaired? There is truly the same reason also, touching every kinde of Fishing. . . .

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Maine *et al.* Exhibit No. 207

Spelman, Sir Henry, *The English Works of Sir Henry Spelman* (Edmund Getson ed., 1723)

226 OF THE PLACES SUBJECT TO THE ADMIRALTIE.

The Place subject to the Admiraltie is of two sorts, one in respect of Jurisdiction, the other in respect of Coercion only.

The Place of Jurisdiction is the Sea, which is either common or appropriate.

The common Seas are those which lye so remote from . . . . . of every Prince, as none may justly claim them . . . . . unto him, or to have any generall Jurisdiction . . . . . but every of them particularly over his own Subjects . . . . . there.

The appropriate Sea is that which joyneth to the Territories of any Prince, as namely his Majesty of *England* . . . . . the face thereof be free for all Men as touching . . . . . and Navigation; yet the Beddy and Soil belongeth to the particular Lord: so that no Man haply ought to cast a Net or Anchor therein, but by his Favour and License, for which they commonly render Toll and Custome.

By this reason the King of *Spaine* doth not only monopolize the Fishing for Pearle, and the Wealth of the *Indian* Seas, but in jealousy thereof, the very Liberty of Navigation also. And the Kings of *Denmark* in times past have compelled our Countrymen using the *Iseland* Fishing, to pay a Custom or Tribute unto him, as King of those Seas.

* * *

229 But the Customes and Law of *England* seemeth to have broken the generality of these [Roman] Laws; for the Soyle of the Shore and Sea adjoining, is now the King's, and particular Lords, according to their Titles: Insomuch that it is ordinary to take Toll and Custom for Anchorage, Groundage, *Etc.* And some Lords do lett the stony Places near the Sea to Island Merchants to dry their Fish.

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Maine *et al.* Ex. No. 209

Welwood, William, *An Abridgment of all Sea-Lawes* (1613 ed.) (London 1590)

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67 For answere, first concerning the nature of the sea, as supposed impossibly occupable or acquirable; Is this so thought because the sea is not so solid, as is the land, that men may trade thereon, as upon land? or that it is continually flowing to and fro? Surelie, that lack of solidity for man his trading thereon by foote, shall not hinder the solid possession of it, farre lesse the occupation and acquiring, if wee will giue to the sea, that which the Jurisconsults indulgently graunt to the land, which also cannot bee denied. *Paulus* the Jurisconsult saith, . . . that is, it is not needfull for him who would possesse himselfe in any part of the land, to goe about and tread over the same; but it is sufficient to enter-in upon any part thereof, with a mind to possesse all the rest thereof, even to the due marches. And what can stay this to be done on sea, as well as on land? And thus far concerning the solidity.

* * *

68 God hath diversly informed men by the helps of the compasse, counting of courses, sounding, and other waies, to find forth, and to designe *finitum in infinito*, so farre as is expedient for the certain reach and bounds of seas, properly pertaining to any Prince or people. . . .

69 Which bounds *Bartolus* hardily extends and allowes for Princes & people at the sea side, an hundreth miles of sea forth from their coasts, at least; and justly, if they exercise a protection and conservacie so farre: and this reach is called by the Doctors *Districtus maris et territorium*.

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Maine *et al.* Ex. No. 211

2 Wynne, William, *The Life of Sir Leoline Jenkins* (1724)

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698 . . . [T]he King of *England* for the Time being is Lord of those Seas, where he hath the Right of his Flag acknowledged; and that those Seas are, as much as that watery Element is capable of being so in its Nature, no less a Domain of the Crown, than the Honour of *Greenwich*, or Manor of *Eltham*.

. . . [A]s the King in his Domains on Land enjoys all he has by written Law, or else by Custom, so he enjoys what he hath in his *Seigneurie Territoriale* by Sea, partly by Law, and partly by Custom, against his own Subjects; but by Custom principally, which hath a Force no whit inferior to that of a written Law, being duly prescribed and circumstantiated against all Strangers whatsoever.

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Maine *et al.* Ex. No. 212

Zouch, Richard, *The Jurisdiction of the Admiralty of England Asserted* (London 1663)

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17 The Admirall of *England* (as Mr. Selden observes) hath another manner of Right, and Jurisdiction, than the Admirall of *France*, or other ordinary Admiralls, for that the Jurisdiction over the Seas of *England*, and *Ireland*,
18 and the Dominions and Isles of the same as a Province are committed to his Custody and Tuition, as to a President to defend the same, as in the Dominion of the King, by whom he is Authorized, The bounds of which Jurisdiction are limited and determined in those Seas; and besides, as the *French*, and other Admiralls he hath the power over the Navy, and the Government over the Sea-men, and Jurisdiction over the persons and moveable goods which come under his Judicature, . . . which Jurisdiction hath [illegible] bounds, but extends to the *Mediterranean*, *African*, and *Indian* Seas, or any other far remote.

* * *

Maine *et al.* Ex. No. 221

755 **PROCLAMATION OF JAMES I. FOR THE RESTRAINT OF FOREIGNERS FISHING ON THE BRITISH COASTS.**

(A Booke of Proclamations, &c. 1609 [1602-1672].)

James by the Grace of God King of Great Britaine, France and Ireland, Defender of the Faith, &c. . . .

Whereas wee have bene contented since our comming to the Crowne, to tolerate an indifferent and promiscuous kinde of libertie to all our friends whatsoever, to fish within our streames, and upon any of our coasts of Great

Britaine, Ireland, and other adjacent Islands, so farre foorth as the permission or use thereof might not redound to the empeachment of our Prerogative Royall, nor to the hurt and damage of our loving Subjects, whose preservation and flourishing estate we hold our selfe principally bound to advance before all worldly respects: So finding that our connivence therein, hath not onely given occasion of over great encrochments upon our Regalities, or rather questioning for our Right, but hath bene a meanes of much dayly wrongs to our owne people that exercise the trade of Fishing as (either by the multitude of Strangers, which doe preoccupy those places, or by the injuries which they receive most comonly at their hands) our Subjects are constrained to abandon their Fishing, or at the least are become so discouraged in the same, as they hold it better for them, to betake themselves to some other course of living, whereby not onely divers of our Coast-townes are much decayed, but the number of Mariners dayly diminished, which is a matter of great consequence to our Estate, considering how
756 much the strength thereof consisteth in the power of Shipping, and use of Navigation: We have thought it now both just and necessary (in respect that wee are now by Gods favour lineally and lawfully possessed, aswell of the Island of Great Britaine, as of Ireland, and the rest of the Isles adjacent) to bethinke our selves of good lawfull meanes to prevent those inconveniences, and many others depending upon the same. In the consideration whereof, as we are desirous that the world may take notice, that we have no intention to deny our neighbors and Allies, those fruits and benefits of Peace and friendship, which may be justly expected at our hands in honour and reason, or are affoorded by other Princes mutually in the point of Commerce, and exchange of those things which may not proove prejudiciall to them: So because some such convenient

order may be taken in this matter, as may sufficiently provide for all these important considerations which doe depend thereupon; Wee have resolved first to give notice to all the world, That our expresse pleasure is, that from the beginning of the Moneth of August next comming, no person of what Nation or qualitie soever, being not our naturall borne Subject, be permitted to fish upon any of our Coasts and Seas of Great Britaine, Ireland, and the rest of the Isles adjacent, where most usually heretofore any fishing hath bene, untill they have orderly demanded and obtained licenses from us, or such our Commissioners, as we have authorised in that behalfe, viz. at London for our Realmes of England and Ireland, and at Edenborough for our Realme of Scotland: Which Licenses, our intention is, shall be yeerely demanded, for so many Vessels and ships, and the Tonnage thereof, as shall intend to fish for that whole yeere, or any part thereof, upon any of our Coastes and Seas as aforesaid, upon paine of such chastisement, as shalbe fit to bee inflicted upon such wilfull offendors.

Given at our Palace of Westminster, the 6. day of May, in the 7. Yeere of our Reigne of Great Britaine, &c.

Anno Dom. 1609.

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Maine *et al.* Ex. No. 223

S. P. Dom., Car. 1, CCCXIII (1635-36)

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210 Feb. 5. [1636] 24. Lords of the Admiralty to the King. Report on two points recommended to them by the King for their consideration; vizt. the employing his

fleet for his honour and profit. 1. In wafting merchants that pass through his seas; and 2. For protecting fishermen that exercise that trade by his Majesty's license. After hearing Sir Henry Marten they were all of opinion that the right and royalty of fishing upon his Majesty's coasts belongs to him by inheritance, so that he may justly prohibit or license strangers. The present occasion of his strength at sea is most proper to put in execution his just claim. Are of opinion that it should be intimated to the Minister of the United Provinces residing here that the King is resolved to defend those fishings in the same manner as the hereditary right of any other of his dominions, but that he offers the fishermen of the United Provinces licenses which will entitle them to safety and protection in fishing, for that he will draw the sword for maintenance of his licenses against any. With respect to wafting of merchant strangers' ships, they are of opinion that he ought to have profit by it, to be taken of such as desire waftage, in proportion to the value of the ship and the length of the waftage.

* * *

Maine *et al.* Ex. No. 237
1. Acts of Privy Council (Col.) #65

40 [65.] Whitehall, 18 June [1621]

Whereas there was a petition exhibited unto his Majestie in the name of the Pattentees and Adventurers in the Plantation of New-England concerning some difference betweene the Southerne and Northerne Colonies, the which petition was by his Majestie referred to the consideration of the Lords. Their Lordshipps upon the hearing and debating of the matter att large and by the consent of both Colonies did establish and confirme two former orders, the one

bearing date the 16th of March 1619 agreed upon by the Duke of Lenox and the Earle of Arundell (to whom the busines was referred by the Board) the other of the 21th of July 1620 ordered by the Board, whereby it was thought
42 fitt, that the said Colonies should fish att Sea within the limitts and bounds of each other reciprocally, with this limitation that it bee onely for the sustentation of the people of the Colonies there and for the transportation of people into either Colonie (as by the said order more att large appeareth) And further it was ordered att this present by their Lordshipps, That they should have freedome of the Shore for drying of their nettes, and taking and saving of their fish, and to have wood for their necessary uses, by the assignement of the Governors att reasonable rates. Lastly that the Patent of the northerne plantation shalbe renewed, according the premises, And those of the Southerne plantation to have a sight thereof before it be ingrossed, And the former Patent to be delivered into the handes of the Pattentees.

* * *

Maine *et al.* Ex. No. 270

***CSP, Col., 1700,* Nos. 368, 641**

418 Address of the Governor, Council and Assembly of Massachusetts Bay to the King. About 18 months since we represented to your Sacred Majesty the insults of our neighbours the French, and the interruptions by them given to your Majesty's good subjects in their Fishery, as also their ungrounded claim to a considerable part of your Majesty's dominion, namely, to extend their boundary as far W. as the River of Kennebeck. A copy of this Address and of the proof of the matters therein set forth we presume to lay before your Majesty, humbly praying that your Majesty

may cause effectual order to be taken for the speedy and vigorous assertion of the antient acknowledged extent of
419 your Majesty's territory within that Eastern Country reaching to the River Ste. Croix next adjoining to New Scotland in America, as appears by the grant of King Charles II. to James, Duke of York, March 12, 1664; and of the undoubted right and privilege of your Majesty's subjects to fish in the seas on the whole Eastern Coast, conformable to your Majesty's right of Sovereignty over the seas. . . .

* * *

Maine *et al.* Ex. No. 276

An Act to Entitle Garret De Graeuw and his Assigns to the Fishery of Porpoises during the Term of seven Years. 1 *Colonial Laws of New York* **(1894).**

839 An Act to Entitle Garret De Graeuw and his Assigns to the Fishery of Porpoises during the Term of seven Years.

[Passed, September 4, 1714.]

Whereas the Fishery of Porpoises and other Fishes of that Nature will tend to the benefit of Trade in this Colony, and add to the facilitating the returns of the same; And Whereas Garret De Graeuw in his Petition presented to the General Assembly has set forth, That by certain New Inventions by him found out he has perfectly enabled himself and is actually ready to the sure and successfull carrying on the said Fishery, humbly praying, That, in regard of his peculiar Industry and great Charge, It may be Enacted in his Favour and for his Encouragement That none but the said Garret De Graeuw his Executors Administrators and Assigns shall be permitted to carry on the said Fishery by the same Inventions for a certain Term of Years.

Be it enacted by his Excellency the Governour, the Council and General Assembly, and by the Authority of the same, That no person or persons whatsoever, from and after the Publication of this Act, shall undertake or presume to carry on the Fishery of Porpoises and other Fishes of that Nature by the said Inventions in the seas, Harbours, Rivers and other Waters within this Colony, for and during the Term of seven Years, but the said Garret De Graeuw his Executors Administrators and Assigns, to whom only the sole benefit, profit and Advantage arising from the said Fishery by the said Inventions shall belong and appertain. Saveing nevertheless the Right of her Majesty her heirs and Successors.

And be it further Enacted by the said Authority, That if any person or persons, from and after the Publication of this Act, shall undertake or carry on the said Fishery, by the Inventions of the said Garret De Graeuw contrary to and Frustrating the true intent and meaning of this Act, he or They shall forfeit and pay the sum of one hundred Pounds Current Money of this Colony of New York to be recovered in any Court of Justice within this Colony by Action of Debt, one half thereof to her Majesty her Heirs and Successors, and the other half to the said Garret De Graeuw his Executors Administrators or Assigns who shall sue for and recover the same.

And be it further Enacted by the Authority aforesaid, That in Case the said Garret De Graeuw, his Executors Administrators or Assigns, do not within the time of Twelve Months from the publication hereof putt his said Inventions in Effectual Practice and execution then it shall and may be lawful for any other person or person to undertake and carry on the said Fishery, without incurring the penalty mentioned in this Act, any thing contained in this Act to the contrary hereof in any wise Notwithstanding.

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Maine *et al.* Ex. No. 277

An Act for Preserving of Oysters.
1 *Colonial Laws of New York* (1894)

An Act for Preserving of Oysters.
[Passed, May 19, 1715.]

845 Be it Enacted by the Governour Council & General Assembly & by the Authority of the same, That from & after the Publication of this Act, it shall not be Lawfull for any Person or Persons Whatsoever (Native free Indians only excepted) from & after the first day of May, until the first day of September Annually to gather, Rake, take up, or bring to the Market, any Oysters whatsoever, under the penalty of Twenty shillings for every Offence, to be recovered before any of His Mat'ys Justices of the Peace, who are hereby Authorized & required to hear & finally Determine the same, one half thereof to him, her or them, that shall prosecute the same to Effect. & the other half to the Poor of the place where the Offence shall be Comitted.

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Maine *et al.* Ex. No. 280

An Act for the Preservation of Oysters at and near Richmond County in this Colony.
2 *Colonial Laws of New York* (1894)

1067 An Act for the Preservation of Oysters at & near Richmond County in this Colony.

[Passed, December 16, 1737.]

WHEREAS it is found by daily Experience that the Oyster Beds Lying at & near Richmond County within this Colony are wasted & destroyed by Strangers. The preventing of which will tend to the great benefit of the Poor People & others Inhabiting the aforesaid Colony.

BE it therefore Enacted by his Honour the Lieutenant Governour the Council & the General Assembly, and it is hereby Enacted by the Authority of the Same, that no Person or Persons whatsoever not Residing within this Colony from & after the Publication of this Act, do presume Directly or Indirectly to Rake or Gather up any Oysters within this Colony and put them on board any Canow
1068 Periauger Flat Scow Boat or other Vessel whatsoever not wholly belonging to & owned by Persons who live within the aforesaid Colony under the Penalty of Seizing and Forfeiting of all Such Canoes Periaugers Flats Scows Boats or other Vessells as Shall be found doing the Same together with all the oyster shells oyster Rakes Tongs & all furniture & Apparel thereto belonging.

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Maine *et al.* Ex. No. 283

Charter, Free Society of Traders. *Annals of Pennsylvania* (Hazard, Samuel, ed. 1850)

* * *

541 On the 22d and 23d March, William Penn granted to N. Moore and others, deeds of lease and release for a large body of land, and by the following charter, dated March 25th, erects it into a manor, and incorporates them into a company, with most extraordinary powers and privileges, by the name of the Free Society of Traders. This is the Pennsylvania company heretofore alluded to.

* * *

549 "And I do, for myself, and my heirs and assigns, grant unto the said Free Society of Traders, free fishing of whales, sturgeon, and all royal and other fishes in the main sea and bays of the said province, and in the inlets, waters, and rivers within or adjoining to the said twenty thousand acres, or any part thereof, the said Free Society

of Traders, and their successors, yielding and paying unto me, William Penn, my heirs and assigns, the sum of one shilling yearly, ..."

* * *

Maine *et al.* Ex. No. 326

An Act for the Preserving of Oysters in the Province of New-Jersey. *The Acts of the General Assembly of the Province of New-Jersey, From the Time of the Surrender of the Governments of the said Province, and the Fourth Year of the Reign of King George the Second.* (1732)

103 Whereas it is found by daily Experience, that the Oyster-beds within this Province are wasted and destroyed by Strangers, and others at unseasonable Times of the Year, the Preservation of which will tend to the great Benefit of the poor People, and others inhabiting this Province,

Be it therefore Enacted by the Governor, Council and General Assembly of this Province, and it is hereby Enacted by the Authority of the same, That no Person or Persons whatsoever shall Rake or Gather up any Oysters or Shells from and off any Beds within the said Province, from the Tenth Day of *May* to the First Day of *September,* yearly and every Year, after the Publication hereof.

104 *And Be it further Enacted by the Authority aforesaid,* That no Person or Persons whatsoever, not residing within this Province, from and after the Publication hereof, shall not, directly or indirectly, Rake or Gather up any Oysters or Shells within this Province, and put them on board any Canow, Periauger, Flat, Scow, Boat, or other Vessel whatsoever, not wholly belonging to and owned by Persons who live within the said Province, under the Penalty of Seizing and Forfeiting of all such Canows, Periaugers, Flats, Scows, Boats, or other Vessels, as shall be found

doing the same, together with all the Oysters, Shells, Oyster-Rakes, Tongs, Tackle, Furniture and Apparel thereto belonging.

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Maine *et al.* Ex. No. 336

12 Reports from Committees, Session 8 February – 15 August 1876.

REPORT

iii THE SELECT COMMITTEE appointed to inquire what are the Reasons for the present Scarcity of OYSTERS, and what has been the effect of the Measures relating to OYSTER FISHERIES adopted by PARLIAMENT subsequently to the REPORT of the ROYAL COMMISSION on SEA FISHERIES in 1866, and to report what further Legislative Measures may, in the opinion of the Committee, be desirable; – HAVE considered the matter to them referred, and have agreed to the following REPORT:–

THAT your Committee having examined witnesses and taken evidence relating to the questions referred to them, have come to the conclusion that the supply of Oysters round the British coast has for some years steadily decreased, and that though, to some extent, cold seasons have contributed to cause this diminution, the principal cause is to be found in the continual and constantly increasing practice of over-dredging for them in open waters without allowing any sufficient close time. Your Committee have also obtained evidence from France, in which country regulations for close seasons for some years have been more or less rigidly insisted on, and it appears to them that in proportion to the stringency with which these regulations have been enforced, the supply of Oysters has increased. Your Committee have therefore come to the conclusion that it is desirable to make provisions for a general close time for Oyster Fisheries, and that it should

extend from the 1st of May to the 1st of September in each year. There are, however, portions of the sea, especially the Estuary of the Thames, where it is doubtful whether any close season for dredging would be required; and a power should therefore, in the opinion of your Committee, be entrusted to the Board of Trade, after inquiry, to shorten, vary, or determine this close season in any particular case.

Your Committee also recommend that the Board of Trade, on the application of local authorities or for other sufficient reasons, may set apart districts within which, for limited periods, no dredging whatever should be allowed. They also think that where orders are applied for by local authorities, every facility should be given to them, and that no charge should be made for the expense of the Department in connection with such schemes.

Your Committee would recommend, with regard to the Oyster Fisheries of private individuals, that subject to the restrictions for the sale of Oysters in the close season, the regulations as to dredging should not apply.

As regards the Deep Sea Fisheries, your Committee are of opinion that the close season enacted by the Convention Act of 1868, viz., from the 15th of June to the end of August, is sufficient; and they recommend that no Oyster should be sold from the Deep Sea Fisheries under 2½ or 3 inches in diameter.

Your Committee recommend that a penalty should be inflicted for buying or selling Oysters during the close season for the purposes of consumption.

Your Committee are of opinion that the close season, and other regulations which may be enacted, should be enforced under the superintendence of Inspectors, and that the services of the Coastguard men should be employed.

iv Your Committee approve the practice of granting portions of foreshore to private individuals and companies for the purpose of breeding and feeding Oysters.

They are further of opinion that the policy of making grants of portions of the bottom of the sea, or the foreshore, for the cultivation of Oysters, should be continued, subject to this, that the grants should be limited in extent, and liable to forfeiture, if not usefully employed for the object of oyster cultivation.

Your Committee are of opinion that such amendments of the law as would give effect to these recommendations should be made with the least possible delay. Pending such legislation, your Committee are of opinion that every fishery, formed under the orders of the Board of Trade, should be inspected at the earliest possible opportunity. The reports of the Inspectors should be laid before Parliament at the commencement of each Session.

7 July 1876.

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Maine *et al.* Ex. No. 445

Joseph Chitty, Jr., *A Treatise on the Game Laws and on Fisheries* (London, 1812)

239 OF PUBLIC FISHERIES.

FISHERIES are *public* or *private*. Public are either fisheries in distant seas in which all nations have a right to fish, and some of which are encouraged by act of parliament, or they are fisheries within the four seas, or within public navigable rivers in which all British subjects have a right to fish, in exclusion of other nations, subject in some particular instances to modifications by acts of parliament,

or the prescriptive rights of individuals. *Private* fisheries are those in which some particular persons are entitled to an exclusive right of fishing.

* * *

241 The general immunity, by virtue of which all nations may fish in the sea, is confined to those seas which have not been appropriated by a particular state, or are not within a certain distance from its shores: for although, by the law of nature, the sea is in general open to all mankind, the right of fishing in ports and rivers, or even on the coasts of an independent state, could never have
242 been considered or intended to be admitted as an universal right, nor could a foreign power send vessels to navigate within the limits of such maritime districts, or take fresh running water on the shore, without permission expressed or implied; neither can the interests of maritime states admit a promiscuous liberty to strangers to fish or navigate within their seas, since it might affect both their personal security and personal sustentation. Their personal security would be endangered by the facility afforded to foreign powers to make inimical incursions upon them; and their food might be lessened by the exhaustion of their fisheries; for, though fishing is abundant in the sea, it is manifest that it may in part be exhausted, especially if all nations should desire such a right and liberty near the coasts of any particular country; and as it is very usual that some particular kind of fish, or perhaps some more precious commodity, as pearls, coral, amber, or the like, are to be found only in one part of the seas, and that of no considerable extent, the congregation of many people to that part must necessarily prejudice the people of the neighbouring shore. In this case, then, there is no reason why the borderers should not rather challenge to

themselves this happiness of a wealthy shore, or sea, than those who are seated at a distance from it. And, according to Bodinus, by a kind of common right enjoyed by
243 all princes of maritime countries, the particular sovereign may command and controul those who approach within sixty miles of his shore. And most of the modern writers upon the law of nations agree that each state is mistress of the sea on all sides within cannon shot of her coasts, which is explained to mean three leagues; and for that reason, a vessel taken within cannon shot of a neutral fortress, is not a lawful prize. Those parts of the open waters which encompass the four sides of the British islands, and are therefore known by the name of the British Seas, have long been acknowledged by most nations as her lawful possession, and exempt from the intrusion of other nations.

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Maine *et al.* Ex. No. 449

Robert G. Hall, *Essays on the Rights of the Crown* (1875 ed.)

1 *Of the King's Title to the British Seas.*

THE British Seas, sometimes called the Four Seas, are those which encompass the coasts of England, Scotland, and Ireland. To the west they not only include the sea between Great Britain and Ireland, but extend over the Atlantic Ocean, which washes the western coasts of Ireland: this western part of our sea is subdivided; for, so much as runs between England and Ireland is called St. George's Channel, or the Irish Sea; and the sea on the west coast of Scotland is sometimes named the Caledonian, Deucaledonian, or Scottish Sea, and sometimes the

North Sea. To the east we have the German Ocean, which is bounded principally by the opposite coasts of Germany, and the United Provinces (now Belgium); lastly, to the south there is the British Channel, or Sea, which runs along
2 the French coast, and, comprehending the Bay of Biscay, ends with the northern coast of Spain.

Over the British seas, the King of England claims an absolute dominion and ownership, as Lord Paramount, against all the world. Whatever opinions foreign nations may entertain in regard to the validity of such claim, yet the subjects of the King of England do, by the common law of the realm, acknowledge and declare it to be his ancient and indisputable right.

This dominion and ownership over the British seas, vested by our law in the King, is not confined to the mere usufruct of the water, and the maritime jurisdiction, but it includes the very *fundum* or soil at the bottom of the sea. "The sea is the King's proper inheritance," and he is "Lord of the Great Waste," both land and water; "*tam aquae quam soli.*" Selden, in his celebrated treatise on the Dominion of the Seas, would seem to contemplate this ownership of the King, as combining both jurisdiction and ownership; the one, indeed, would seem to involve the other, if Selden's doctrine to its full extent be admitted.

There are eminent writers upon natural and upon national law, who have controverted Selden's doctrines, and have denied the King of England's exclusive dominion and consequently his ownership over the British seas; but however this may be, and probably will ever continue *vexata quaestio* between such writers, we know that the writers on the common and municipal law of England, as
3 well as the decisions of our judicial courts, all speak the

same language, and appropriate the dominion of the British seas *tam aquae quam soli,* to the King.

This dominion not only extends over the open seas, but also over all *creeks, arms of the sea, havens, ports,* and *tide-rivers,* as far as the reach of the tide, around the coasts of the kingdom. All waters, in short, which communicate with the sea, and are within the *flux* and *reflux* of its tides, are part and parcel of the sea itself, and subject, in all respects, to the like ownership. This is abundantly proved by the cases hereinafter referred to, where the public *right of fishing* in the creeks, arms of the sea, havens, ports, tide-rivers, &c., of the kingdom has been, in many instances, established upon the principle that they are *part of the sea,* and of the King's dominion, and as such, liable to the common law of right of the subject to fish therein; of which right we shall, in a future page, take notice.

4 Lord Hale, in the treatise ascribed to him, aptly compares the King's property in the sea and tide-rivers, creeks, &c., to the ownership of lords of manors in the common or waste lands of the manor. The soil and freehold of
5 the waste belong to the lord, but subject to certain rights of the manorial tenants; such as common of pasture, piscary, turbary, ways, &c., claimed and enjoyed by them, by the custom of the manor, in and out of such waste
6 lands. So the king is lord of the great waste of the sea, subject to certain beneficial rights and privileges of fishing, navigation, &c., immemorially enjoyed by his subjects therein, by the custom of the realm, which is the common law.

The title of the King of England to the land or soil *aqua maris cooperta,* is similar to his ancient title to all the *terra firma* in his dominions, as the first and original

proprietor and lord paramount. It is a fundamental principle of our laws of property in land, that all the lands in the realm belonged originally to the King; and, according to the feudal principles of our ancient laws of tenure, the landowners of England are, to this day, *tenants* to the King, holding their lands of him, as their lord paramount.

That part of the land which the King and his ancestors have never granted out to the subject, remains to the King, as his *demesnes,* in absolute ownership. The *terra firma* of England has become, almost entirely, the property (by grant and tenure) of the subject; but the *terra aqua maris cooperta* still remains to the King in wide and barren ownership.

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Maine *et al.* Ex. No. 451

Henry Schultes, *An Essay On Aquatic Rights* (London 1811)

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8 The sea surrounding the British empire is considered as part of the realm, and within the jurisdiction of the government; and the sovereign of England, since the Saxon times, has been constantly acknowledged to be the lord and sovereign of the sea, and his jurisdiction and interest
9 is said to extend between Britain and France, and to the middle of the sea between Britain and Spain.

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Maine *et al.* Ex. No. 458

2 Reginald Marsden, ed., *Documents Relating to Law and Custom of the Sea* (1915-1916)

* * *

256 1721. Penrice to Burchett (?), as to the limits of the British Seas. – *Adm. Sec. In Letters 3670.*

The Lords of the Admiralty having asked, Whether by the 'British seas' mentioned in the convention with Spain of Feb. 1719 for cessation of arms the said seas ought to be allowed to extend as far as Finisterre? Penrice, after referring to the authorities cited by Hedges in his report of 1699 (*supra,* p. 231), and setting out the words of the convention, continues as follows:

By the treaty of cessation with France in August 1712 ships are to be restored that are taken in the Channel and in the North Seas after twelve days, and after six weeks taken beyond the Channel, the British seas, and the North seas, as far as Cape St. Vincent. This second limitation, though it fixes no certain bounds to the British seas, does not confine them to the Channell, but allows the British seas to comprehend seas different and contradistinguished from the Channel, which is taken only as a part of the British seas. The treaty of cessation with France in 1712 is confirmed by the treaty of peace with Spain at Utrecht in July 1713, by the 16 Article of which it is agreed to
257 be well and truly executed, according to the tenor thereof, in all things relating to captures made in the British or Northern seas or Elsewhere. So it is very plain by this treaty with Spain that the British seas must be extended beyond the chops of the Channel, though the boundaries are not expressed in the treaty. Since, therefore, it is allowed by the King of Spaine's advocate that the British

seas to the Southward are bounded by the coasts of Spain; since, by the treaty with Holland in 1673 the Dutch have agreed to strike their flag in any seas as far as Finisterre, which must be taken to be in acknowledgment of the British sovereignty in those seas; since, by their Lordships' Instructions to the captains of his Majestie's men of war, his Majestie's seas are declared to extend to Cape Finisterre; and, since it does not appear by any treaty between Great Britain and Spain, either written or printed, that the extent of the British seas is otherwise specified or agreed between the two Crowns, these are reasons to induce me to think that the British seas mentioned in the first limitation of the convention for cessation with Spain may be taken to extend as far as Finisterre.

But this is humbly submitted to their Lordships' consideration, whose long experience and compleat knowledge in marine affairs will enable them to form a right judgment in this point, which has not yet been settled by any treaty that I know of.

[*Dated June 16, 1721.*]

* * *

Maine *et al.* Ex. No. 461

"The Advantages of the Fishery to Great Britain Demonstrated" (1719) (Fearing Collection, Harvard University)

* * *

19 Not to mention our Rich *New-England Fishery*, our *Western* Ports are incomparably scituated for the *Newfound-Land Fishery*, and the Country itself belonging to the Crown of *England*, you [the Dutch] can have no footing there.

* * *

Maine *et al.* Ex. No. 469

Pitman Potter, *The Freedom of the Seas in History, Law and Politics* (1924)

* * *

38 The kings of Spain included the phrase *del mar Oceano* (of the ocean) in the list of regions subject to their rule. The kings of Portugal put forward a claim to control the "navigation of (to?)" African and Asiatic regions rich in colonial trade. Not only were unlicensed traders – alien or native – excluded from landing and trading in the regions of Ethiopia, Guinea, Arabia, Persia, and India so controlled by the Portuguese, but from sailing in the adjacent seas.

The states of northern Europe likewise entered this race for maritime dominion. The French kings claimed to be supreme lords of all the seas which touched their coasts. The Danes claimed dominion in the Baltic – a claim never extinguished explicitly in principle to this day. Polish sovereignty of the sea was a matter of solicitude to her French allies, and both Danish and Polish pretensions were matters of great concern to the intervening Hanse towns.

Culminating in the British claims to sea dominion, this long and extensive body of state practice found here its most vigorous expression. A document of Alfred extended the King's power to the middle of the surrounding seas, and Edgar styled himself "king . . . of the ocean lying round
39 about Britain." After the Conquest this claim was maintained and considerably extended. John required (1200) the striking of sails to all British ships at sea. Edward I (1272-1307) instructed his naval officers to maintain firmly "the sovereignty which his ancestors the kings of England

were wont to have in the sea so far as concerns the amendment, declaration, and interpretation of the laws by them made to govern all manner of nations passing through the said sea."[22] Henry IV (1399-1413) granted leave to a certain Spaniard to sail "freely from the port of London through our dominions to the town of Rochelle,"[23] and Elizabeth (1588-1603) was besought by the king of Sweden to grant permission to one Wormacus to sail to Spain "through the sea-dominions of the Queen," as the king wrote.[24]

In *Regina v. Constable* it was held that "the Queen hath the whole jurisdiction of the sea between England and France."[25]

22 Tower, MS., quoted in Selden, Bk. II, Chap. 20; see also document of Edward in Coke, *Institutes*, Chaps. 22 and 44, holding that the King of England is in possession of the sovereignty of the sea of England, and that "within the four seas" means within English jurisdiction.

23 *Rot. Franc.*, 5 Hy. 4, quoted in same; the same king later gave a permit to French ambassadors to pass "through all places under our power, our territories, our seignories, by sea and land" (same).

24 Selden, Bk. II, Chap. 20, quoting from MS. letter in the library of Thomas Cotton.

25 Leonard, *Reports*, Vol. III, 72. Such writers as Meadows and Buroughs and Clavel affirmed English rights to exclude "all foreign ships of war from passing upon any of the seas of England without special license for that purpose first obtained," and that the sovereignty of the British seas was the most precious jewell in His Majesty's crown, and that "the King of Great Britain is Lord of the sea flowing about, as an inseparable propriety and perpetual appendant of the British Empire." Meadows, 7; Buroughs, 56; Clavel, 1.

40 Much more evidence of the same type might be exhibited here. Admirals' commissions were based on the proposition that the British kings were "lords of the English sea on every side."[26] Parliamentary records contain similar allusion to the "sovereigns of the sea," "lords of the sea," and so on.[27] Charles I, in levying ship money in 1634 declared that the British kings had ever been lords of the English sea, and this confirmed his current actions.[28] In the *Ship Money Case (Rex v. Hampden)* it was held that the King was sovereign of the sea and that therefore his subjects were bound to fight and be taxed to defend that sovereignty.[29] In a famous charge Sir Leoline Jenkins, sitting in admiralty at the Old Bailey, described "the sovereignty of our King in the British ocean," and asserted British power in the Four Seas, "to keep the public peace on these seas," "to maintain the freedom and security of navigation the world over so that not the utmost bound of the Atlantic Ocean nor any corner of the Mediterranean nor any part of the South or other seas but that if the peace of God and the King be violated upon any of his subjects or upon his allies or their subjects, and the offender be afterwards brought up or laid hold of in any of his Majesty's ports, such breach of the peace is to be inquired of and tried in virtue of a commission of oyer and

26 Commission quoted in Selden, Bk. II, Chap. 23, from *Rot. Scot.*, 10 Edw, 3. Further on exercise of the right of vail, and capture for failure to observe same, see Raleigh, Vol. VIII, 327; Ogilvie, 77-79.

27 Quotations from *Rot. Parl.*, 46 Edw. 3 and 8 Hy. 5, in same.

28 Proclamation of 20 October, 1634, quoted in same; for various documents illustrative of the British claims in the early seventeenth century see Fulton, 749-774.

29 1637; Broom, 303-367.

41 terminer, as this is, in such country, liberty, or place, as His Majesty shall please to direct; so long an arm has God by the laws given to his viceregent the King."[30]

It will be observed that there are two elements present here. There is a great body of state practice, and there is some considerable comment upon it by observers.

The activities of maritime states as just reviewed were quite clear and definite in intention. Attempts were being made to secure control over various bodies of water for the sake of the practical advantages to be gained thereby. But in addition to this we observe a new tendency, a tendency to specifically claim, as a matter of right, the dominion sought by force of arms, a thing not so clearly observable in past times. The appearance of proud and pretentious personal rulers and of pushing mercantile states led to the assertion of claims sometimes exorbitant, sometimes unsupported, but always unabashed and frank.

The implication is that such claims could, as a general matter, be made and vindicated whenever the appropriate circumstances justified such action. In other words, it is implied that an institution of national maritime dominion was recognized and accepted as part of the principles of interstate relations or even international law and custom.

The language of the historians and private scholars seems to bear out this implication. "Princes have a right to impose tolls," says one writer.[31] Feudal legal terms – seignory, royalty, and so on – were commonly employed to

30 Quoted in *Queen v. Keyn,* 1876, L. R. 2 Exch. Div., 63; also in Wynne, *Life,* Vol. I, xc-xcv.

31 Bonius, Art. 16, §40, quoted in Selden, Bk. I, Chap. 16; see Nau, §88.

42 describe the situation. There is common talk of the "empire of the sea (*imperium maris*)" and "sea kings (*maritimos reges*)." The language and the thought of these writers is substantially a duplication of that of the Greek historians in their day, with added emphasis upon the element of right and legal authority.

* * *

44 It is necessary, however, to recognize from this time on a regular allignment of authorities and evidence on one side and the other of the principal issue: whether it is possible, by the law of nations, to acquire a dominion over the sea; and whether such a dominion may be exercised to exclude persons from the use of the sea, to charge tolls therefor, and so on.

State practice, we have seen, all tended to indicate an affirmative answer to this question. Likewise, the newly developing bodies of national law tended to produce the same result. The traditional rules of the Roman law providing for public use of the sea and shores were repeated as the Civil Law was worked out in Spain and France and elsewhere, but they did not prevent the assertion of claims on the part of the Crown to control the sea and to grant to individuals exclusive privileges therein. Indeed, the public use of the sea and shores came to be placed mainly on the basis of a national title thereto, subject only to special
45 grants or special claims open to all men in like circumstances.[45]

In England this situation became very involved. Bracton (1260) repeated the principle that the sea is "common" by natural law, as stated in the Institutes, and set forth

45 Documents quoted in Selden, Bk. I, Chap. 17.

the rights of public building and fishing on shores and in seas and harbors and rivers. Then, quite without any apparent feeling of contradiction, he declares the king's right to levy tolls on fishermen in the public waters, treats of pourprestures made upon the sea and of the four seas around England as parts of the realm.[46] The Fleta followed Bracton.[47] The net result was a clear claim to some degree of national territorial jurisdiction over the sea.[48]

The establishment of admiralty jurisdiction in England is a subject all by itself but it sheds much light upon the view of the English law regarding the freedom of the sea at the time.[49] Ever since the thirteenth century Britain had been troubled by claims of French and Flemish victims of British sea-robbers or pirates.[50] Failing to settle matters satisfactorily by negotiation, and feeling compelled to conciliate Flemish commercial opinion, the British Crown decided, in the middle of the fourteenth century (1340-
46 1357) to establish certain special courts to deal with cases of piracy.[51] Heretofore prize matters had been dealt with

[46] Bracton, I, 12, 5, 6; II, 24, 2 and 5; III, 1, 3; III, 2, 1 and 116 and 118; V, 30.

[47] *Fleta*, I, 20, 18; III, 1, 4.

[48] See also Dooms of Ipswich (13th century) on the "iiij sces of Ingleland" as part of the realm for certain purposes; Belknap (1390) and Littleton (1475) followed the same doctrine. Twiss, Vol. II, 45. So Rolle (1668), Vol. I, 170, ¶18, following Selden.

[49] In general: Marsden, *Pleas*, Vol. I, Introduction, xiv.

[50] And by claims of Venetian and Genoese merchants to the same effect; Britain also had claims against Flemish and Breton pirates: Marsden, *Pleas*, Vol. I, Introduction, xxxv.

[51] Marsden, as cited, xiv, xxxviii; Twiss, as cited, Vol. I, 29, n. 3.

by the courts of common law.[52] Edward III (1327-1377) now claimed again a special guardianship or jurisdiction over the sea, and since, after the battle of Sluys (1340), he was in point of physical fact master of the channel, he was able to vindicate his claim. The new courts of admiralty were to maintain "peace and justice among the people passing through the sea of England."[53]

To a large extent, of course, we have here merely a national pretension, not by itself conclusive upon the point whether maritime dominion was legally possible for any one and whether the British had secured such a dominion. And for the acquiescence of other states, the evidence is not uniform. There is an old recognition of British maritime sovereignty by a Congress of the Empire in 1299.[54] And another in the time of Edward I.[55] Edward II (1307-1327) had, apparently, secured in 1320 an admission from certain Flemish negotiators that he was "lord of the sea" and that a certain robbery "was committed on the sea within his power."[56] But this was not universal, and both the French and Spanish protested against the idea of Brit-
47 ish maritime dominion put forward by Edward III, so that in the end the jurisdiction was founded on personal grounds, through the captors of the vessel in question.

[52] Holdsworthy, Vol. I, 304-313.

[53] Selden, Bk. II, Chap. 24; Marsden, Vol. I, xv. The Admiralty office had dealt heretofore only with naval administration and discipline.

[54] Vattel, Vol. I, Chap. 23, §289, citing Selden, Bk. II, Chap. 28.

[55] Molloy, Vol. I, Chap. 5.

[56] Marsden, as cited, xxii, xxxiii, xxxiv. Edward I had defended his claim to maritime sovereignty against the Flemings in 1207; Marsden, xxxiv.

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Maine *et al.* Ex. No. 473

Order by Governor of New York Establishing Cod Fishing Company, 24 *New York Colonial Manuscripts* (1675)

* * *

1 The Governor desiring and resolving by all Ffitting means in his Power, to Promote and Encourage a Codfish Ffishery in this Government, And finding Upon enquiry, and the best informacon and Advice, That the Most Probable meanes to effect it, is by a Company and Joynt Stock, doth by the advice of his Councell, allow and Authorize the Same, in the manner after Exprest, To witt.

* * *

That upon the 9th of February, every Member of the Said Company, or his Sufficient, Deputy, Shall meet together at New Yorcke to consult, and by the Plurality of votes make all orders, Rules and officers, and So from time to time, and take all Accounts for The mannageing, improving and ordering all things relating to the said Company, and Joynt Stock as above, for the Said Ffishery, and then appoint or give Direccons for another generall meeting or Meetings as Shall bee thought necessary.

* * *

2 THAT this Company bee not understood any wayes to debarre or hinder any other Person or Persons from Ffishing by themselves, or in Companyes, as they Shall like Best.

By order of the Governor

Matthias Nicoss, Sec.

* * *

Maine *et al.* Ex. No. 476

An Act to entitle Lovis Hector Piot De Langloiserie to the Sole Fishery of Porpoises in the Province of New York during the Term of Ten Years, 2 *The Colonial Laws of New York* (1894)

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311

An Act to entitle Lovis Hector Piot De Langloiserie to the Sole Fishery of Porpoises in the Province of New York during the Term of Ten Years.

[Passed, June 17, 1726.]

WHEREAS the Fishery of Porpoises will tend to the Benefit of Trade in this Colony and enable the Inhabitants thereof to make Considerable returns for great Britain by their own Industry. AND WHEREAS the said Lovis Hector Piot De Langloiserie by his Petition to the General Assembly of this Colony, has Set forth that by an Exact observation of the Methods Used and Practiced in other Countrys, he has obtained a perfect knowledge of Catching and Taking Porpoises in an Effectual manner. AND for his Encouragement humbly prayed that noe but he the Said Lovis Hector Piot De Langloiserie his Executors, Administrators and Assigns be permitted to carry on the Said Fishery in the Same Manner and Method as Shall be Used by the Petitioner for Such a Term of Years as the Said Assembly Should think meet. And it being Just and Reasonable that the Projector or Undertaker of Such a Fishery should be Encouraged therein, because the Success thereof will undoubtedly tend to the Benefit of the Province in General, and to the Undertaker in particular. BE it therefore Enacted by his Excellency the Governour Council and General Assembly of this Colony, and it is

hereby Enacted by the Authority of the Same, That no Person or Persons whatsoever from and after the Publication of this Act, shall Undertake or presume to Carry on the fishery of Porpoises in the Same manner and Methods as the said Petitioner shall make Use of, in the Seas Harbours, Rivers and other Waters within this Colony for and during the Term of Ten Years, but he the said Lovis Hector Piot De Langloiserie his Executors Administrators and Assigns to whom only the Sole Benefit Proffit and
312 Advantage Ariseing from the said Fishery of Porpoises in the Manner & Methods aforesaid Shall belong & Appertain SAVEING Nevertheless the Rights of His Majesty His Heires and Successors. . . .

* * *

Maine *et al.* Ex. No. 481

Act relating to Fishing, ***Record Containing the Agreements Acts and Lawes of the General free Assembly of the Province of West New Jersey in America and Confirmed by the Governour thereof from their first Session att Burlington begun the 21th day of the nyenth month called November in the yeare 1681*** **(1693)**

Whereas the Whalery in Delaware Bay has been in soo great a measure invaded by strangers and foreigners that the greatest part of oyle and Bone reserved and gott by that imploy hath been exported out of the Province to the great detriment thereof, to obviate which mischiefe, Be it Enacted by the Governor Councill and Representatives in this Assembly mett and assembled and by the Authority of the same, that all Persons not resydding within the Premiss of this Provinse or the Provinse of Pennsilvania who shall kill or bring on shore any whale

or whales within Delaware Bay or elsewhere within the Boundaries of this Government shall pay one full and entyre tenth of all the oyle and Bone made out of the said Whale or Whales unto the present Governor of this Provinse for the time being.

* * *

Maine *et al.* Ex. No. 491

An Act for the preserving of Oysters in the Province of New-Jersey (March 27, 1719), ***Acts of the General Assembly of the Province of New Jersey*** **(1776)**

* * *

57 Passed March 27, 1719.

WHEREAS it is found by daily Experience, that the Oysterbeds within this Province are wasted and destroyed by Strangers, and others, at unseasonable Times of the Year, the Preservation of which will tend to the great Benefit of the poor People and others inhabiting this Province;

Sect. I. BE IT THEREFORE ENACTED *by the Governor, Council, and General Assembly of this Province, and it is hereby Enacted by the Authority of the same.* That no Person or Persons whatsoever shall rake or gather up any Oysters or Shells from and off any Beds within the said Province,
58 from the tenth Day of *May* to the first Day of *September,* yearly and every Year, after the Publication hereof.

2. AND BE IT FURTHER ENACTED *by the Authority aforesaid,* That no Person or Persons whatsoever, not residing within this Province, from and after Publication hereof, shall not, directly or indirectly, rake or gather up any Oysters or Shells within this Province, and them put on board

any Canoe, Periauger, Flat, Scow, Boat or other Vessel whatsoever, not wholly belonging to and owned by Persons who live within the said Province, under the Penalty of seizing and forfeiting of all such Canoe, Periauger, Flat, Scow, Boat or other Vessel, as shall be found doing the same, together with all the Oysters, Shells, Oyster-rakes, Tongs, Tackle, Furniture and Apparel thereunto belonging.

* * *

Maine *et al.* Ex. No. 499

Acts Relating to Fish and Fishermen, Colony Laws (1646, 1652, 1668), *The Charters and General Laws of The Colony and Province of Massachusetts Bay*

* * *

113 SECT. 1. WHEREAS it hath been a custom for foreign fishermen to make use of such harbours and grounds in this country, as have not been inhabited by Englishmen, and to take timber and wood at their pleasure for all their occasions, yet in these parts which are now possessed, and the lands disposed in proprieties, unto several towns and persons, by the king's grant, under the great seal of England:

It is declared, that it is not lawful for any person, either fisherman or other, either foreigner or of this country, to enter upon the lands so appropriate to any town or person, or to take wood or timber in any such place, without the license of such town or proprietor; and if any person shall trespass herein, the town or proprietor so injured may take their remedy by action at law, or may preserve their goods or other interest, by opposing lawful force against such unjust violence; provided that it shall be lawful for such fishermen as shall be employed by any inhabitants of this jurisdiction, in the

several seasons of the year, to make use of any of our harbours, and such lands as are near adjoining for the drying of their fish or other needful occasions, as also to have such timber and fire wood, as they shall have necessary use of for their fishing seasons where it may be spared, so as they make due satisfaction for the same
114 to such town or proprietor. [1646.]

SECT. 2. Whereas much damage hath arisen to merchants trading hence, by bad making of fish, and the credit of our trade therein hath much suffered:

It is therefore ordered, that at every fishing place within this jurisdiction, some discreet and honest person be appointed by the country court, unto which such fishing place doth belong, and those persons so nominated and appointed are by this court empowered to give oath unto such persons as shall be chosen by the deliverers and receivers of any fish, who have liberty hereby, either of them, to choose one or more sufficient knowing men in such cases, to view what fish is delivered and received; which viewers shall be sworn as aforesaid, and what they approve of as merchantable, the receiver shall accept, and what is refuse fish shall be cast by, and the said viewers, for their labour and pains aforesaid, shall be allowed one penny per quintal for so much merchantable fish as he or they shall view, to be paid one half by the deliverer, and the other half by the receiver:

And for further direction to the viewers in trial of fish:

It is hereby ordered, that all sun burnt, salt burnt and dry fish, that hath been first pickled, shall be judged unmerchantable. [1652.]

SECT. 3. For the explanation of an order bearing date, 1646, and the repealing of the same, 1667, for giving a liberty to fishermen, according to a reservation in the patent, to cut down wood for flakes or stage and other uses about their fishing employ, that it is intended only in that order to give liberty to such as are strangers, and come only to make fishing voyages, and not to fishermen that are inhabitants, who are not to trespass upon any person in their propriety, but are liable to make satisfaction with damages as in any other action of trespass, no way restraining fishermen in common lands, any law, custom or usage to the contrary notwithstanding. [April, 1668.]

SECT. 4. It is ordered by this court and the authority thereof, that no man shall henceforth kill any codfish, hake, haddock, or pollock, to be dried for sale in the month of December of January, because of their spawning time, nor any mackerel to barrel up in the month of May or June, under penalty of paying five shillings for each quintal of fish, and five shillings for each barrel of mackerel; nor shall any fisherman cast the garbage of the fish they catch overboard at or near the ledges or grounds where they take the fish; nor shall any of the boats' crew refuse or neglect to obey the order of the master of the vessel to which they belong, for the times and seasons of fishing; nor shall they take or drink any more strong liquors than the master thinks meet to permit them: the
115 breach of these three last being under the penalty of twenty shillings for the first offence; for the second forty shillings; for the third three months imprisonment, one third part of the aforesaid fines to the informer proving the same. [1668.]

SECT. 5. This court being informed, that the taking of mackerel at unseasonable times do greatly diminish their increase, and will in the issue tend to the spoil of the trade thereof:

Do order and enact, that henceforth no mackerel shall be caught, except for spending whilst fresh, before the first of July annually, on penalty of the loss of the same; the one half to the informer, and the other half to the use of the country. And any magistrate or county court is empowered to act herein to all intents and purposes, for the execution of this law.

Maine *et al.* Ex. No. 503

An Act For The Regulating And Encouragement Of Fishery (Nov. 26, 1692), Acts of 1692/93, *The Acts And Resolves, Public and Private, Of The Province Of The Massachusetts Bay* 71

71 Upon consideration of great damage and scandal, that hath happened upon the account of pickled fish, although afterwards dried and hardly discoverable, to the great loss of many, and also an ill reputation on this province, and the fishery of it, –

Be it therefore enacted by the Governour, Council and Representatives, convened in General Court or Assembly, and it is enacted by the authority of the same,

[SECT. 1.] That no person or persons whatsoever, after the publication hereof, shall save or salt any sort of fish (that is intended to be dried) in cask or fattes, or any other way then what hath formerly and honestly been

practised for the making of dry fish, on penalty of forfeiting all such fish so salted and pickled, whether it be green or drye; the one moiety thereof to the use of the poor of the town where the offence is committed, and the other moiety to the person that shall sue for the same.

And it is further enacted by the authority aforesaid,

[SECT. 2.] That henceforth no mackrel shall be caught (except for spending whilst fresh) before the first of July annually; and no person or persons whatsoever, after the publication hereof, shall at any time or place within this province take, kill, or hale ashore any mackrel, with any sort[s] of nets or sa'ens whatsoever, on penalty of forfeiting all such mackrel so taken or haled ashore, and also all such nets and sa'ens which were so imployed; the one-half thereof to their majesties towards the support of this their government, and the other half to him or them that shall inform and sue for the same. And all justices are hereby impowred, and required to grant their warrants for the seizing of the same and the aforesaid forfeitures, or the receiving of the like value in currant money of this province. [*Passed November* 26.]

Maine *et al.* Ex. No. 554

Indian deed of Southhampton, Dec. 13, 1640, *The First Book of Records of the Town of Southampton with Other Ancient Documents of Historic Value* (1874)

* * *

12 **Indian Deed.**

This indenture, made the 13th day of December, Anno Dom. 1640, betweene Pomatuck, Mandush, . . .

the native Inhabitants & true owners of the eastern pt. of the Long Island, on the one part, and Mr. John Gosmer, Edward Howell, . . .

13 on the other part, witnesseth that the sayed Indians for due consideration of sixteene coats already received, and alsoe three score bushells of indian corne to bee payed upon lawfull demand the last of September, which shall bee in the yeare 1641, . . . doe absolutely & for ever give & grant & by these presents doe acknowledge ourselves, to have given & granted to the partyes above mentioned. . . . all the lands, woods, waters, water corses, easements, proffits & emolumeents thence arisinge what soever, from the place comonly knowne by the place where the Indians hayle over their cannooes out of the North bay to . . . south side of the Island, from thence to possess all the lands lying eastward between the forsaid bounds by water, to wit, all the lands lying eastward between the foresaid bounds by water, to wit, all the land pertaining to the parteyes aforesaid, as alsoe all the old ground formerly planted lying eastward from the first creek at the westemore end of Shinecock plaine, . . . with all emolumonts & profits thereto appertaining or any wise belonging from sea or land within our limitts above specified without all guile wee have set to our hands the day and yeare above sayd.

* * *

Maine *et al.* Ex. No. 565

"The Reasons of the Strangers answered . . . fishing in His Majesties Seas . . . ." [circa 1605-161?5] Papers of Sir Julius Caesar, Admiralty, British Museum.

* * *

1 *Title:* The reasons of the straungers answered touching their contynewance of fishing in his Majesties seas; with a furder declaration what profitt, and commodity the taking of the same into his Majesties owne handes, And renting it forth for the tenth fish maye bring forth to his Highness and his Realmes.

TOUCHING HIS MAJESTIES TITLE

Wee answere thus, that King Edgar did write himself Lord and King of the Four great Seas, and surveyed the same, twice every yeare; Which was long tyme, before there were any Inhabitants in Holland of any reckoning, or accompt. Furthermore it is to be prouved, that King Philipp the Second, King of Spayne, had a lease graunted him, from Queene Mary, for XXI years, to lysence his subjects to fish uppon the Irish Coasts (under whose obedience the Hollanders lyved) and payed 1000£ per annum, into the Treasury of Ireland to Sir Edward Fitton, then beeing Treasurer there, who had the receipt thereof for his tyme. And his son Sir Edward Fitton, who nowe lyveth, hath seene, and read the same lease, which hee will testifie uppon his oath, if neede requyre. Besydes Mr. Camden in his discourse of Yorkshire sayeth, no straunger, nor hollander durst let fall a net into the Seas, till they have obtained leave of Scarborough castill; All which sheweth the kings right.

2 PRECEDENTS GIVEN BY OTHER KINGS AND PRYNCES TO OTHER FISHERMEN FISHING IN THEIR SEAS

Fishing in Russia many leagues from the Mayne, they are compelled to paye a greate tribute to the Emperor. In the Shotland Islands, and other Islands there adjoyning under the King of Swethen, they are compelled to paye great taxes in like case. Under the King of Denmark, our English fishers are compelled to paye greate tribute, both at Wardhowse and Sound. Likewise the Duke of Medina Sydonia in Spayne hath his greatest Revenues in taxing his fishermen, for their fishing of Tuny, As also all the prynces of Italy bordring uppon the seas, make the like benefit. Also our fishers in the west parts of England, taking pilchards [?] there doe paye the tenth fish to the lord of the manor next a adjoyning, And likwise dyvers chief Lords inhabiting upon the sea costs, have Tribute payed unto them in like manner in many other places in England.

FOR MOVING OR WARRE, WEE ANSWERE THUS

That there is not found in any Records, that a Tribute, Tith, or Tax demanded in kynd, did ever move warre, for that many tymes, fishers bee dryven to throw into the seas, for want of Salt or Cask, well neare as many fish as would answere this demand, beeing in so myld a manner as it is meant it shall bee.

Agayne (under most humble reformation) there is small likelihood of moving contention, or warre, beeing a thing of comon examplared, and well known to bee payed to other kings and Prynces in their severall kyngdomes and dominoins, as aforesaid; And therefore, the only waye to contynue peace and amitye, is the paying his Majestie his due. Besydes, no contrye is in generall chardged therewith, but only such, as are fishermen fishing within his

3

Magesties seas, principalities and Royaltys, which no sovereyne king or prynce can denye; which beeing graunted, no cause then of moving warre, the demaund beeing so reasonable, as to bee satisfied with the tenth fish. Furthermore, these fishers, taking all or most parte of the fish they have within his Majesties Seas; who notwithstanding doe pay Taxes to their owne Prynce or Sovereyne [?] after a certeyne Date for every kynd of fish they take, If so (as certayne it is) then Reason, the foundation of Law and Justice, sayth they should paye to the king or Prynce, in whose seas they take the same, and by which they lyve; And therefore in reason no cause of moving contention by any such inposition, or tax,

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Maine *et al.* Ex. No. 566

"The Case Between Browne the Scottish Man and the Dutch Captaine" and "The . . . Case between His Majesty and the States of the United Provinces . . ." [1617]

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1 [An opinion of Julius Caesar, Admiralty Judge, and Counsel in 1617.]

Endorsements:

1) 28 Nov. 1617. The Case betweene Browne the Scottish Man and the Dutch Capttaine (399 verso)

2) The State of the Case between his Majesty and the States of the United Province, touching the remanding to his Majesty of 2 Delinquents. 19 Nov. 1617. (401 verso)

The Case.

In August 1617 (blank) Browne His Majesties Subject of the Kingdome of Scotland, was by authority from that State sent in a Pinnace of the king, to the subjects of the United Provinces who weare then fishing for herrings upon the coastes of Scotland, to demand a certeine acknowledgement claimed by his Majesty, as due unto him in the right of that Crowne.

Browne comminge amongst them, and having delivered his errand, was forthwith arrested, and carryed prisoner into Holland, by a Dutch commander in that ffleete: pretending his warrant and commission from the Lords the States so to doe. His Majestie (havinge represented this indignitie, by his Ambassador there, to the Lords the States, and beinge thence advertized that the States disavowed the fact of that Captaine) requireth the offender there, to be remannded unto himself heare, to receive as to Justice shall appertainc.

2 The Question. Whether this Offender ought to be sent herein to his Majestie as is required.

Answeare. There are good authorities, that if a subject of one State comitte a haynous crime, within the territory of an other state (though against a private person) the subject so offendinge, ought to be remitted to the place where the cryme was committed, if it be required.

* * *

Maine *et al.* Ex. No. 570

State Papers Domestic, Charles I.
[Draft of a proclamation, circa 1635.]

1 Whereas Our Father of blessed memory, King James, did in ye 7th year of his Reigne of Great Brittaine, set forth a Proclamation touching Fishing, whereby for the many Important Reasons, therein expressed all Persons of what Nation or quality soever (being not His Natural-Born-Subjects) were restrained from Fishing upon any ye Coasts and Seas of Great Brittaine, Ireland and ye rest of ye Isles adjacent, where most usually heretofore Fishing had been, until they had orderly Demanded and Obteined Lycenses from Our said Father or his Commissioners in that behalf, upon pain of such chastisement as should be fit to be inflicted upon such willfull Offenders. Since which time albeit neither Our said Father nor Our Selfe have made any considerable Execution of the said Proclamation, but have with much patience expected a voluntary conformity of Our Neighbours and Allies, to so just and reasonable a prohibition and directions as are contained in ye same. And now finding by experience, that all ye inconveniences which occasioned that Proclamation, are rather encreased than abated, besides that Our Right and Regalities in those Seas & Fishing places, are more confidently questioned then heretofore. We being very sensi-
2 ble of ye Premises, and well knowing how far We are obliged in Honor *and Conscience* to maintain ye Rights of Our Crown, especially of so great consequence, have thought it necessary by ye Advice of Our Privy Councell, to renew ye foresaid Restraint of Fishing upon Our foresaid Coasts, without Lycense first obtained from Us. And by theis Presents to make publick Declaration, That Our

Resolution is, at all times convenient, to keep such a competent strength of Shipping upon Our Seas, as may (by Gods Grace) be sufficient, both to hinder such further encroachments upon Our Regalities, and assist and protect those Our good Friends and Allies, who shall henceforth by vertue of Our Lycenses, to be first obtained, endeavour to take ye benefit of Fishing upon Our Coasts and Seas, in ye Places accustomed.

Copy upon ye Bronillon found
in ye Paper office.

Proclamation
June, 1635

* * *

Maine *et al.* Ex. No. 604

[Admiralty judges' opinion, February 25, 1635.]

It may please your Majesty.

1 According to your Majestyes commandment wee your Commissioners for your Admiralty, have mett & consulted of those two pointes which you were pleased to recomend unto our consideration, touching ye employing of your Fleete for your Honor & proffit. The one for the Wafting and Securing of Merchants that passe through your Majestyes Seas, the other, for protecting all Such Fishermen in generall, as shall exercise that Trade, by your Majestyes licence upon your Seas, & coastes.

The first of these that fell into debate was that concerning ye fishing & by Sir Henry Martin it was made evident unto us that your Majestyes Father of blessed memory in [blank] yeare of his Raigne was upon long & mature consideracion satisfied & resolved that the fishing in his Seas, & upon ye Coasts of his dominions did justly appertain unto him, as a right incident to his Crownes, & that in
2 pursuance thereof he did then sett out His Royall Proclamation, thereby declaring his title as allso his pleasure that noe stranger of what qualitie soever should presume to fish there with out his expresse licence, & so was graciously pleased in ye said Proclamation to appoint that for ye Coastes of England & Ireland licences should be given in London, & for that of Scotland in Edembourg.

And howsoever Sir Henry Martin did alsoe make it appeare unto Us that the states of the United Provinces did at that time send Commissioners into England, representing to His Majesty a Paper contayning allegations, by which they did intend to prove a continued custome, & a present possession of that fishing, mentioning with all some Treaties that had beene heretofore between the Kings of England, & the Dukes of Burgundy in favor of that their fishing, yet upon ye whole matter, & after due deliberation, wee were all of opinion & are so still that the Right & Royalty of that fishing upon your Majestyes Coastes, doeth undoubtedly belong unto you, by inheritance so as you may justly prohibit or licence all strangers as your Royall will & Pleasure.

3 In this wee were much guided by that which your Majesty your selfe was pleased to declare unto us touching ye protecting of all such Fishers as should take your licence: for it is most certain that the Hollanders will by noe meanes be so much induced (be the right what it will)

as by considerations of their owne proffit, & safety. Wee therefore thought fitting, (& do humbly offer it to your Majesty as our opinions) that unto ye Minister or Ministers of ye states residing heere it may be intimated, & declared that your Majesty doth noe way relinquish that just right & clayme which you selfe have & your Predecessors ever have had these Royall fishings so divolved unto you from your Royall Predecessors, but are resolved to defend it as the inheritance & possession of any other your Dominions, yet least they should think you did now challenge it in tyme when they have most neede of your favor & grace, it may be told them that it is farre otherwise: for whereas your Majestyes Father did barely offer them licences you do now offer them safety & protection with all, & that which further move's you to doe it in this season, is, that by a third Prince, who pretendes no interest at all, they are of late interrupted & beaten from that fishing, even in light of your Majestyes harbors: wherein your Majesty is prejudiced in honor & interest, & they in profit.

That it is not unknowne by ye states how much their Enemies are resolved to interrupt that their fishing, as holding it a most certain way & meanes, both to weaken & impoverish them.

4 That be takeing licences from your Majesty you may justify the drawing your sword in theire defence, & for the maynteynance of the said licenses against any not with standing any League, or Treaty whatsoever, which with out that obligation may seeme a breache of that neutrality which hetherto your M.[ajesty]hath preserved in your selfe.

And lastly wee tooke into consideration that in case the Hollanders shall willfully refuse to take these licences upon so gracious & favorable conditions from your Majesty then so wee weere all cleere of opinion that your Majesty should renew & publish the like proclamation to that of the King your ffather, & prosecute the settling of that your right as a thing so highly concerning you in honor, Dominions, & proffit. And se wee do humbly conclude this point, with advise that all such licences as shall be granted be rated according to ye tunne or burden of the vessells so to be licensed.

Touching that of the wafting of Merchants strangers Shipps that shall passe through your Majestyes Seas, wee are cleere of opinion that your Majesty ought to have proffit by it, seeing they are thereby preserved from oppression & ruine but wee are not of opinion that this proffit should arise by way of a generall imposition upon all that passe, for that would doubtlesse draw a just complaint & clamor from your neighbour Princes, & their subjects, but that it should be taken of such as shall desire waftage, which your Majesty may direct not to be denyed to any of what Christian Nation soever that shall demand it *not being men of warre.*

5 And because it will be a difficult matter to expresse in any commission, or Instruction a certain somme or duty to be taken of every ship so wafted, for that som shipps are rich, outhers of lesse value, some will require a short waftage, others a longer. Therefore wee are of opinion that for ye value much is to be left to the discretion of your Generall & Commanders, & that some honest and able man may be employed to Keepe bookes, and to receave the moneys of all these waftings which shall occur, and be accomptable, and answerable for ye same.

Maine *et al.* Ex. No. 609

[Letter from Secretary Windebank to Sir Balthasar Gerbier, Dec. 29, 1637.]

[Sir Balthazar Gerbier was the King of England's Agent at Brussels. The "Conde d' Oñate" was Condé de Oniate et de Villa Medina, Ambassador Extraordinary from Spain to the English crown.]

Mr. Secretary Windebank to Sir Balthasar Gerbier. — Westminister 29 Dec: 1637

The Ambassador (Conde d' Onate) [sic] opposes not His Majesties Sovraiginety in his Seas, nor his Power to grant Lycenses, nor shall the Subjects of the King of Spayne interrupt such as shall take his Majesties Lycenses while they are fishing in his Majesties Seas.

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Maine *et al.* Ex. No. 621

HCA 1/10/Part I/No. 23. Admiralty Records. [Indictment of Bartlet, Heritson and Marshall for Failure to Salute the English Flag. December 30, 1674.]

1 The jurors for our sovereign Lord the King do upon their oath present, that since the British Seas are, and from the time beyond the memory of man have been, within the sovereignty and of the dominion of the Kings of England for the time being as a parcel of the Kingdom of England; and since the said British seas are, and from the beginning of the reign of our Sovereign Lord Charles

the Second, by the grace of God now king of England, Scotland, France, and Ireland, Defender of the Faith, etc. have been within the sovereignty and of the dominion of our said Lord the King in right of his crown of England; and since also by an ancient and lawful custom and prescription used from time to time beyond the memory of man, the commanders, masters and sailors of all and singular ships and vessels of whatever nations and foreign countries sailing in and upon the said British seas or any part thereof which shall meet or be near any ship or vessel then belonging to the King of England for the time being, and then carrying the flag or ornaments [literally:
2 the curved stern of a ship with its ornaments of flags, streamers, etc.] of the said King have been accustomed to, and ought to, and are bound immediately to withdraw their flag from the top of the mast and lower their topsail respectively in due acknowledgment of the supreme dominion of the King of England for the time being in and upon the aforesaid British Seas. Yet nevertheless, Christian Bartlet, recently from Ostende in Flanders, a gentleman in the land beyond the seas, pilot of a certain foreign ship drawn up for war generally called in English (?) the Young King of Spain, near the aforesaid port of Ostende, and a certain Derrick Heritson from the aforementioned Ostende, who was a sailor, and Cornelius Marshall or Mareshall also from the aforementioned Ostende, who was a sailor knowing ___(?)___ in this same foreign ship from Ostende were with many mariners, unknown to the said jurors, confederating and conspiring together, on the _(?)_ day of August in the ___(?)___ year of the reign of our said Lord Charles the Second by the grace of God King of England, Scotland, France, and Ireland, Defender of the Faith etc. about the third hour after noon on the certain day on the high sea in a certain place within

the said British Seas about 18 leagues from the harbour of Rye in the county(?) of Sussex in the distance; and within the jurisdiction of the Admiralty of England, and
3 sailing with the flag or ornaments of the said foreign vessel from Ostende flying openly aloft and also with the topsail of the said ship hoisted up and spread out on the top of the mast, there met with and was near a certain ship or vessel called the Woolwich, being a ship or vessel of war belonging to our said Lord the King under the government and command of Captain Henry Carverth then and there carrying the ensign, flag, ornaments, and pendant called the Ensign Jack of our said Lord the King, openly and plainly flying. But the aforementioned Christian Bartlet, Derrick Heritson, and Cornelius Marshall or Mareshall and the aforesaid mariners then and there being in the aforesaid foreign vessel from Ostende, nor any one of them, did not withdraw the said sail from the said top of the foreign ship from Ostende and then, in the execution of the aforesaid confederacy and conspiracy, they did not lower, nor did any one of them lower, the aforesaid top sail of the foreign ship of Ostende then and there. And the aforesaid Henry Carverth being the captain of the said ship of war called the Woolwich, as aforesaid, and seeing that the said Christian Bartlet, Derrick Heritson, and Cornelius Marshall or Mareshall and the aforesaid mariners, or any one of them, had not removed the flag, nor was removing the flag then and there from the top of the mast of the aforesaid ship of Ostende, nor had lowered nor were lowering the topsail of the said foreign
4 vessel from Ostende which was then and there raised and spread out, which they ought to and were bound to do, did then and there, attending to the duty of his office in that behalf, and as the custom is when and so often as such acknowledgement due and payable by the aforesaid custom to the King of England for the time being

is not so much ___(?)___, and according to the aforesaid custom paid, fire and discharge various great guns from the aforementioned ship or vessel of the said Lord King called the Woolwich then and there against the said foreign ship of Ostende called the Young King of Spain, to the end and intent that the said Christian Bartlet, Derrick Hertison, and Cornelius Marshall or Mareshall and the aforesaid mariners in the said foreign vessel of Ostende being warned by the discharging of the said guns, should, according to the said custom, withdraw the flag from the top of the mast and lower the topsail of the said foreign ship of Ostende then being upon the high sea within the aforesaid British Seas and place aforesaid. Nevertheless, the aforesaid Christian Bartlet, Derrick Hertison, and Cornelius Marshall or Mareshall and the aforesaid mariners, then being, as aforesaid, in the said foreign vessel upon the high sea within the said British seas in the place aforesaid, or any one of them did not withdraw the said flag and ornaments of the said foreign vessel flying aloft as aforesaid, nor lower her topsail being hoisted up as aforesaid, but they and every one of them did unlawfully, insolently, and in a hostile manner refuse to do so. And the and every one of them did by force and arms unlawfully, insolently, and in a hostile manner, keep and continue the said flag and ornaments of the said foreign ship aloft flying and her said topsail raised and fixed at the top of the mast, in contempt of our said sovereign Lord the King, and in manifest violation of the aforesaid custom and against the peace of our said Lord the King, his crown and dignity, etc.

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Maine *et al.* Ex. No. 622

HCA 1/10/Part I/No. 32. Admiralty Records.
[Petition of Bartlet, Heritson and Marshall for release from Newgate. January 1674/75.]

1 To the honourable Sir Lionell Jenkins Judge of his Majesty Court of Admiralty and to the rest of the honorable Bench sitting at the Marshallseas.

The humble petition of Captaine Christopher Bartelor, Dierieth Herretson and Cornelius Marishall, commonly called Offenders now prisoners in Newgate.

Humbly showeth your good Honnours that your Petitioners hath ever since your honnours Sentence against them, laine and still doeth in the place abovesaid uppon greate Charges; for so sadd and sorrowfull accomodation: that they are ready to bow downe, and perish under that afliction: their owne miscarriages have plunged them into: haveing very little left to purchis the fruites of the feild to support nature but onely theire praiers to the never Erring hand of providence in heaven and to your good Honnors heart upon earth our Judges to consider our sad and sorrowfull condition and to end our woes uppon whose Clemency and mercy wee Anchorr all our hopes.

2 And ffurther humbley beseech your good Honnours to consider that as wee are Aliens and Strangers to this nation so wee are farr from freinds which togeather by our long and tedious suffering wee are brought to the very bottom of poverty: and consequently not able to pay the [unclear] or fine, as is layd uppon us: and in mercy and compassion to our dayly and howerly sufferings: we humbly beseech your honnours speedy order to remove us into som other more Christian place or prison.

And your Honnours poore petitioners for ever shall be bound to pray to the God of recompenses for your [unclear] and especiall Honnour and happines.

* * *

Maine *et al.* Ex. No. 623

HAC 1/11/No. 17. High Court of Admiralty. Oyer and Terminer Records. Public Record Office, London. (Hereinafter "Admiralty Records.") [Indictment of Peter Giraudeau, for failure to salute the English flag, December/January 1676/77.]

1 HCA 1/11/No. 17. High Court of Admiralty. Oyer and Terminer Records.

[Translation from French by D. H. Flaherty]

[Text of Giraudeau's indictment.]

In spite of the fact that the British Seas have for all time belonged to the Kings of England for the time being, and that all masters and mariners of foreign ships sailing on the said seas, by very ancient customs are bound, when they approach or meet any vessel belonging to the king of England and carrying his flag, to strike their flag and lower their topsail, in due acknowledgment of the supreme dominion and sovereignty of the king of England on the said British seas;

You are accused of having failed in your duty, in that on the 16th day of July last [English style,], at approximately six o'clock in the evening, and about 56 leagues off Cape Finisterre, on the said British seas, and within the jurisdiction of the English Admiralty, you being then in a French vessel called L'esprit de Sabledolon and belonging to the port of Nantes (of which you were master),

flying your flags and with your sails hoisted and approaching a man of war belonging to the king of England, called the Bristol, of which the knight Bery was then captain,
2 and carrying the flag of the present king of England, neither you nor any of your crew lowered or caused to be lowered your flags or sails in accordance with the said ancient customs [although(?)] you were warned by several cannon shots fired by the said man of war of His Majesty of England, but on the contrary you refused unjustly, insolently, and unlawfully to do so.

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Maine *et al.* Ex. No. 624

HCA 1/10/Part II/No. 141. Admiralty Records. [Trial of Peter Giraudeau, January 1676/77.]

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1 [English text]: Peter Giraudeau. Who has been indicted under a charge brought against him by the aforementioned jurors, for not lowering the flag from the top of the mast of a certain foreign ship of war called the Esprit de Sabledolon whose captain or pilot was the same Peter Giraudeau, being within sight of the harbour of Nantes, and for not lowering the topmost sail of a certain ship on the high seas within British waters, at the approach of a certain ship or vessel of war called the Bristoll, a ship of war which is the property of our king and under the command and direction of the master Sir John Berry and of our lord king; and having been questioned through an interpretion by Thomas Bedford (and bound by the oath of John James Benard for a faithful interpretation) whether he was guilty and worthy of blame in method and type as he stood charged, he replied by means of an interpretation that he was not guilty and placed himself on his country as his evidence.

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Maine *et al.* Ex. No. 625

HCA 1/11/Part I/No. 3. Admiralty Records. [Original information against Selingue and De Ville for failure to Salute the English Flag. March 1676/77.]

1 HCA 1/11/part 1/no. 3: High Court of Admiralty, Oyer and Terminer Records.

Endorsement: "The Original Information of Captain Carverth and his Officers against two frenche Captaines namely Anthony Selingue Commander of the ffrigat le fidele of Dunkirk and John de Ville Commander of a Snow or Sleep called la pouppone for not striking to his Majesties ship the ffrancis."

March the 17th. 1676/77.

This afternoone betweene Three and fouer A Clock about Three Leagues S:S:E: from Callis came up Three Vessells before the Winde from the Westward, the Winde being at West S, West: And when they came neare, wee judged they were three of the French Kings Vessells, which soe proved: Whereof of (sic) which was one small ffriggat of about Eight or 10 Gunns, as we judge: The Two Sloopes of about ffower Gunns d(unclear). When theise Vessels came about Cannon Shott of us, the two Sloopes lowered their Topsailes, but whether itt was in obedience to his Majesties Soveraignety, or to keepe Asterne of the ffriggate, we cannot tell: But we doe judge itt was to keepe by the ffriggate, because the ffriggte came within quius-
queh(?) Shott of us with his Pendant, and Top Gallant
2 sayle A Tripp: Upon which wee fired a Gunn with Shott thwart his fforefrott(?) of which he tooke noe notice of:

But [text unclear]

and gott his Starrboard-------aboard, whereby to keepe the Weather ____(?)____ of us, which we could by noe means prevent (although endeavoured). wee Pursued(?) the same tacks about (?) and Luftt (?) as neare him as we could: And fired another shott, and Another to hitt him: upon which he returned a shott towards us, and halled upp his Mainsaille, and the divers (?) Sloopes A sterne of him, all in A Line; and Intending as as (sic) we thought to Inguadge us: We still fireing severall Shott to hitt him, which we thinke some might. Whereupon he findeing our Posotition (?) fired (?) another Gunn with shott directly att us which went betwixt our mast and allsoe A Vallat (?) of small Shott; But did noe damage, and immediately withall gott his ___(?)___ ___(?)___ on board againe, and made all the Saile he could, and likewise the Sloopes: We still keptt fireing att them untill they were out of Shott, and allsoe we gave Chase neare upon Two howers afterwards in hopes it might blow hard, and thereby we might fetch them up: But findeing they did much wrong us both in Saileing and desparing A better winde, we desisted the Chase, being very fforose (?) and night Coming on us soe that there was noe hopes of fetching them up. To the truth of which We have hereunto Set our hands, and are Ready to make Oath.

3 Signed on Board his Majesties Shipp the Francis in Lenox Road the 17 of March: 1677

Henry Carverth Commander
William Pinkman Mate
Bernard Bligh Midshipman
Hugh Full
John Ffatnis Gent.
John Busboe
William Grissop QuarterMaster
Anthony Scolloy

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Maine *et al.* Ex. No. 626

HCA 1/11/Part I/No. 4. Admiralty Records.
[Warrant from the Lords of the Admiralty to the Marshall of the Court for taking Selingue and De Ville into custody, June, 1677.]

1 HCA 1/11/part 1/no. 4. High Court of Admiralty, Oyer and Terminer Records.

[Warrant from the Lords of the Admiralty to the Marshall of the Court]

By the Lords Commissioners for Executing the Office of Lord High Admirall of England.

These are to Authorize and require you forthwith to make your repair on board his Majestys Shipp the Suadadoe now lying at Sheerness Captain James Jenifer Comander, and receive from him unto your Custody, the Person of Captaine Slingue Comander of a fforreigne Shipp of Warr going under the Name of the Fidelle, and of Captain De Ville Comander of a like Forreigne Shipp of Warr commonly called the Pouponne lately seized on upon the Coast of France, and brought in by his Majesties Shippe the Newcastle, and the said Shipp the Suadadoes, in pursuance of his Majesties Comand on that behalfe, in order to their the said Captain Slingue, and Captain De Ville's being brought to a tryal according to Law, for their late refusall to pay the respect due to his Majestys fflagg born by his Shipp the ffrancis within his Majesties Seas; Wherefore you are to keep them the said Captain Slingue, and Captain De Ville in safe
2 Custody untill you shall receive order for their discharge.

And for soe doing this shall be your Warrant. Dated att Derby House the 22nd day of June 1677.

To William Joynes Gentleman Marshall of the High Court of Admiralty

Lauderdale
Hlevenson

By Comand of the Lords.
Pepys.

Maine *et al.* Ex. No. 627

HCA 1/11/Part I/No. 14. Admiralty Records.
[Indictment against Selingue and De Ville, 1677.]

1 HCA 1/11/part 1/no. 14. An indictment against Anthony Selingue and John De Ville in the High Court of Admiralty, 1677:

The Jurors for our Sovereigne Lord the King doe upon their Oath present, That whereas the British Seas are and from time beyond The memory of Man have bin within the Sovereigntie and of the Dominion of the Kings of England for the time being and parcell of the Kingdome of England And that the said British Seas are and from the beginning of the Raigne of our Sovereigne Lord Charles the Second by the grace of God now King of England Scotland ffrance and Ireland Defender of the faith etc. have been within the Soveraignity and of the Dominion of our said Lord the King in right of his Crowne of England. And whereas alsoe by an Anntient and Lawfull Custome and prescription used from time to time beyond the memory of Man the Comanders Masters and Marriners of all and singuler Ships and Vessells of what fforreigne Nation and Country soever Sayling in and upon the said British

Seas or any part thereof which shall meet or be neer any Shipp or Vessell then belonging to the King of England for the time being and then carryeing the fflagg or fack(?) of the said King have used and ought and are bound immediately to strike their fflagg and lower their Topsaile respectively in due acknowledgment of the Supreme Dominion of the King of England for the time being in and upon the British Seas aforesaid. Yet notwithstanding one: [1] John de Vill: of Villerscostnept in Picardia [2] Anthony Selingue late of Boloigne in the Kingdome of ffrance in the parts beyond the Seas Gent: Comander or Master of a certaine fferraigne vessell called the Fidelle [2] the Pouponne belonging to the port of Dunkirke: Knowing the ___(?)___ being in the said fforreigne Ship with many Marriners (unknowne to the said jurors) confederateing and conspiring together, on the 17th day of March in the Nine and twentieth yeare of the Raigne of our said Lord Charles the second by the grace of God King of England Scotland, ffrance: and Ireland Defender of the faith etc. about five of the Clocke in the Evening of the said day on the high Sea in a certaine place within the British Seas about three Leagues from Callice: And within the jurisdiction of the Admiralty of England and Sayling with the flagg of the said fforreigne Vessell aloft flying and alsoe with [their?] Top sayle a trip (or being hoysted up) met with and was near a certaine Shipp of Warr titlled the Francis being a Shipp of Warr belonging to our Said Lord the King under the Government and Command of Captaine Henry Carverth then and there carrying the Ensigne, I ank(?), and pendant of our said Lord the King, openly and apparently fflying. but the aforesaid John de Ville Anthony Selingue and Marriners
3 aforesaid then and there: being in the aforesaid fforreigne vessell or any of them (in execution of the foresaid confederacy and conspiracy) did not strike the flagg

nor did they or any of them lower the Top sayle of the said fforreigne vessell. And that the aforesaid Henry Carveth being then and there Captaine of the said Shipp of Warr called the Francis as aforesaid, And seing that you the said John de Ville Anthony Selingue and Marriners aforesaid or any of them did not strike the fflagg then and there Flying aloft nor lower the Topsayle of the said fforreigne Vessell then and there a Trip (which you ought and were bound to doe) did then and there (attending to the duty of his Office in that behalfe: and as the Custome was and is when and so often as such acknowledgment due and payable by the aforesaid Custome to the King of England for the time being is not presently and according to the aforesaid Custome paid) fire severall great Guns from the said Shipp of Warr of our said Lord the King called the ffrancis against the said fforreigne Vessell called Le Fidelle Le Pouponne of Dunkirke to the end and intent that you the said John de Ville Anthony Selingne (and the Marriners aforesaid yet unknowne to the said Jurors) in the said fforreigne vessell being warned by the dischargeing of the said Gunns, should (according to the said Custome) Strike the fflag and Lower the Topsayle of the said fforreigne vessell then being upon the high Sea within the British Seas and place aforesaid (.) Neverthe-
4 lesse you the said John de Villa Anthony Selingue (and the aforesaid Marriners Yet unknowne to the said jurors) then being (as aforesaid) in the said fforreigne Vessell upon the high Sea within the said British Seas in the place aforesaid or any of them you did not strike the said fflagg of the said fforreigne Vessell soe flying aloft as aforesaid nor Lower her Topsayle: being hoysted up as aforesaid, but they you and every of them you did unlawfully, insolently, and in a hostile manner refuse soe to doe. And they (you) every one (?) of them did by force and Armes

unlawfully insolently and in a Hostile Manner, keep and continue the said fflag of the said fforreigne Ship aloft flying and her said Topsayle a Trip in contempt of our said Sovereigne Lord the King, and in Manifest Violation of the foresaid Custome and against the peace of our said Lord the King, his Crowne and dignity etc.

Notation: "The like against John de Ville of Villerscoshost (sic) in the Kingdome of ffrance in the parts beyond the seas gent. Comander or master of a certaine fforreigne vessell called La pouppone of Dunkirk"

[In the above text the name of De Ville and of his ship appear as inserts above the corresponding information about Selingue.]

* * *

HCA 1/11/Part I/No. 18. Admiralty Records.
[Latin minutes of trial of Selingue and De Ville, August 27, 1677.]

1 HCA 1/11/part I/no. 18. High Court of Admiralty, Oyer and Terminer Records.

[Minutes of Jury Trial including trial of Selingue and De Ville. First mention of them occurs on fourth page of Latin document. We have transcribed and translated only those parts which concern Selingue and De Ville.]

[English text]: Antonius Selingue of Boloigne in the Kingdom of France.

Who has been indicted on a charge brought against him by the aforementioned jurors for not removing the sail from the top of the mast of a foreign ship called the Fidelle,

whose captain or director was Antonius Selingue who was in view of the port of Dunkirke, and for not lowering the top sail of this ship on the high seas in British waters about three leagues from the port of Calice on the approach of a certain ship of war called the Francis, the property of our king and under the command and direction of Henry Carverth and of our king and having been questioned through a translation whether he was guilty and worthy of blame in method and means as was charged, he replied (?) that he was not guilty through the aforementioned translation and for his own justification he placed himself on his country [*i.e.*, he swore in the name of his country.]

2 [Indictment of De Ville now begins.]

[English text]: Johannem de Villo from Villerscostnept in Picardia in the Kingdom of France.

3 Who has been indicted under a charge brought against him by the aforementioned jurors of not lowering the flag from the top of the mast of a certain foreign ship called the Pouponne (of which the divine (?) Johannes de Villo was captain or pilot) within sight of the harbour of Dunkirke, and for not lowering the top flag of a certain ship on the high seas within British waters at the approach of a certain man of war called the Francis, a ship of war which is the property of our king and under the direction and command of _____ Henry Carverth; and having been questioned through the aforementioned translation whether he was guilty and worthy of blame in method and type as he stood charged, he replied that he was not guilty by means of the aforementioned translation, and for his evidence he placed himself on his country.

* * *

4 [Some irrelevant material concerning another case before the court is now omitted, and then the case of De Ville is presented to the jury.]

[English text]: To be determined on their oath whether the aforementioned Johannes de Ville is guilty and worthy of blame or not of the abovementioned misdeeds, contempt and conspiring (?) in method and type as he stands accused, and after the depositions of witnesses had been made against him aloud (or: in person), they gathered together to decide (?) and shortly after returning to ____ they gave their verdict and announced it as follows: The aforementioned Antonius Selingue is submitted to be guilty and blameworthy of the aforementioned misdeeds of contempt and conspiring (?) in method and type as charged above.

* * *

5 [English text]: And it was decided previously that Johann de Ville was not guilty or blameworthy in the aforementioned transgressions, contempts, and conspiring with which he was charged, and that he alleged in excuse in his petition concerning this that he never withdrew or fled on this occasion. Then the aforementioned Antony Selingue was summoned to court from his home and was questioned whether he might have it in his power or might have anything to say on his behalf why the aforementioned judgment previously sworn against him was not, and he said nothing further. And likewise it was considered by the
6 court that he be fined and restrained, and the ame Antonius Selingue was fined and restrained, and the court ordained a total of four hundred pounds for the transgressions, contempt, and conspiracy with which he stands convicted. And the aforementioned Lord Justices decided and brought it about that the same Antony Selingue should

be entrusted to the care and custody of this Marshall in [text unclear] until they [sic] pay the sum of 400 pounds.

It was also considered by the court that the previously mentioned Johann de Ville who as it is stated was acquitted of Transgressions etc., with which he stands charged and arrested (?) go undisturbed from this place, and likewise (?) the Lord Justices decreed that this same Johann de Ville be released from arrest in this place as far as the aforementioned transgressions are concerned, and be removed from prison, and be set free.

Maine *et al.* Ex. No. 629

HCA 1/11/Part I/No. 20. Admiralty Records.
[Crown warrant for pardon of Selingue, August, 1677.]

* * *

1 HCA 1/11/part I/No. 20 High Court of Admiralty. Oyer and Terminer Records.

Endorsement: "Pardon to Anthony Selingue"

CHARLES R

Whereas Anthony Selingue of Boloigne in France late Master or Commander of a Forraine Vessell called Le Fidelle belonging to the Port of Dunkirk in the afternoone of the 17th day of March last past within Our British Seas about Three Leagues from Calais upon meeting with Our Ship of Warre called the Francis (Captaine Henry Carverth Command'r) then carrying Our Ensigne Jack and Pendant flying, did unlawfully, insolently, and in a hostile manner refuse to Strike to Our Flag although he was required so to do by the fireing severall Guns from Our

said Ship of Warre; For which insolency and Contempt he was Tryed at Our Sessions of the Admiralty held in Southwarke, on Monday the Sixth of this instant August and found Guilty by the Jury, and fined by the Court in Foure Hundred pounds, and committed to Prison to be kept in execution till he payd the sayd summe; But upon the humble and submissive request of the said Anthony
2 Selingue We have graciously condescended to forgive the sayd Fine of Foure Hundred pounds, and to lett the said Anthony Selingue at liberty. Our Will and pleasure therefore is, and Wee do hereby direct and require you to prepare a Bill for Our Royall Signature to passe Our Great Seale containing Our gracious Pardon to the said Anthony Selingue for the said Insolency and Contempt done by him to our Flag, with a clause for not paying Fees for the said Pardon under Our Great Seale, and with such other fitting and apt clauses as are requisite and usuall in like cases. And for so doing this shall be your Warrant. Given at Our Court at Whitehall the 27th day of August 1677 in the Nine and Twentieth yeare of Our Reigne.

To our Truely and Welveloved
Sr. Leoline Jenkins Knight
Judge of Our High Court of
Admiralty. Or to the Justices
of Oyer and Terminer
of Our Said Admiralty, or any foure of them.

By his Majesties Command
Henry Coventry

* * *

Maine *et al.* Ex. No. 635

Admiralty 7; Vol. 729, fols. 126-127.
[Letter from Trinity House concerning the extent of the British seas, 1671.]

1 Miscellaneous Admiralty 7. "Compilation of miscellaneous documents relating to the history of the Navy, the Dominion and Sovereignty of the seas, salutes, etc." Vol. 729, "A Collection of Papers and Notes upon the Subject of the Dominion and Sovereignty of the British Seas, the Right of the Flag and all Matters relating to Salutes and Colours," fol. 126-127. [Trinity House was a guild or association of English mariners first chartered under Henry VIII in 1514. Their duties included examination of pilots and control over the erection of beacons and other markers along the seacoasts of England.]

126. Letter from Trinity House, That the British Seas extend to Cape Finisterr or the North Cape, And that the Sea, which washes the Coasts of the Low Countries and France, has been allways reputed part of the British Seas; with reference to their Papers of Instances etc.

Trinity House, Nov. 30th 1671.

2 Sir

In answer to yours of the 8th Instant We having consulted upon the same do return this following Account.

* * *

As to the Extent of the British Seas, It has been commonly received by Us from our Predecessors, that it does extend to Cape Finisterr or the North Cape; and that the Sea which washes the Coasts of the Coasts [sic] of the Low Countries and France, has been allways reputed part of the British Seas. To know how far it does extend Northward, We desire you will please to consult those Authors who have treated on that Subject, it not being known of a certain by Us.

Though the Custom of striking the Flag by our Neighbours to any of His Majesty's Ships as an Acknowledgement of his Sovereignty of the Seas has been ever practised and needs not be disputed; yet since you require something of Proof as to the matter of fact, in the inclosed Paper you will see some of the most Material Instances of their Striking Sail to our Ships, or a single Ship, and that upon their own Coasts.

3 Which being all at present, We remain

Sir

Your humble Servants

Je. Smyth — Tho. Allin
Th: Middleton — In. Swanley
Simon Nicholls — In. Kempthorne
Joseph Dobyns

* * *

Maine *et al.* Ex. No. 637

CO 388/90, fols. 29-31. Board of Trade.
[A copy of Sir Henry Penrice's Report on the extent of the British Seas, 1721.]

* * *

1 Copy

Sr. Henry Penrice's Report to the Lords Commissioners of the Admiralty as to the Extent of the British Seas, Dated Doctors-Commons, 16th June 1721.

Sir,

In Obedience to the Commands of my Lords Commissioners of ye Admiralty Signify'd to me by Your Lettr of ye 9th of this Instant, I have perused & considered the Several papers inclosed to me, & being directed to report my Opinion as soon as conveniently may be;

Whether by ye British Seas mention'd in ye first limitation of ye Cessation with Spain, ye sd. Seas ought not to be allow'd to extend as far as Cape Finester.

I have consider'd the Matter, & do find that the four Seas, vizt. The Southern The Eastern, Western & Northern Seas, are within His Majesty's Dominions as King of Great Britain, and this fully appears by Publick Records & the Opinions of many Eminent Lawyers taken Notice of at large in Admr. Selden's Mare Clausum; And the English Writers particularly assert, That the British Seas extend Southwards to the Coasts of Spain.

* * *

3 Albeneus Gentilis, the King of Spain's Advocate, who resided in England in the time of King James the first, as Agent for the Spanish Nation, owns in plain Terms, that the British Seas to the Southward, were bound by ye Coasts of Spain, His words are Hibernid Meridionalia Termitiantur ad Hispaniam, this out of ye mouth of a Spanish Lawyer residing here, with a Character from the Crown of Spain, confirms the common & ancient receiv'd Opinion of the English, that the British Seas extend from Cape Clare Southward to Cape Finisterre.

And accordingly His Majesties Sovereignty in these Seas which are called the British Seas, or his Majesty's Seas, has been always asserted, & his Honour Maintain'd therein, by the Respect show'd to his Flag; and it is given in Instructions by their Lordships to every Captain of his Majesties Ships of War, that they should take care to have his Majesties Flag respected in His Majestie's Seas, which by those Instructions are Declared to extend to Cape Finisterre.

By Treaty's made with Holland, it appears, that whereas the first Treaty which mention the Striking of the Flag, took Notice of Striking in the British Seas, as in former times, the last Treaty Ano 1673 has explained it, & expressed it to be done as far as Cape Finisterre and tho' the British British [sic] Seas be not mentioned in that Treaty, yet it must be taken as intended, because there is no pretence for that Respect, but upon Account of it's being within the British Seas, for otherwise it might as well be required in all Places whatsoever at Sea.

4 But I do not find that by any Treaty or Special Convention with Spain, the extent of ye British Seas is Settled, the present Convention for a Cessation of Arms with Spain made in Febr. 1719, has four Several Limitation;

1 . . . . After Twelve days, taken in the British & North Seas.

2 . . . . After Six Weeks, taken beyond the British & North Seas, as far as Cape St. Vincent.

3 . . . . After Ten Weeks, beyond the Cape of St. Vincent, as far as ye Equinoctial Line.

4 . . . . After Six Months, taken beyond the Said Equinoctial.

It is observable that in the first Limitation there is the Terminus a quo, the British & North Seas, but no Terminus ad quem, no place or Boundary towards Spain where the Said Limitation ends, whereas in the other three Limitations, there are distinct Spaces both of time & place.

By the Treaty of Cessation with France in Augt. 1712, Ships are to be Restored that are taken in the Channel, & in the North Seas, after Twelve days, & after Six Weeks taken beyond the Channel, the British Seas and the North Seas as far as Cape St. Vincent.

This second Limitation tho' it fixes no certain Bounds to the British Seas, does not confine them to the Channel, but allows the British Seas to comprehend Seas different & contradistinguish'd from the Channel, which is taken only as part of the British Seas.

5 This Treaty of Cessation with France in 1712, is confirmed by the Treaty of Peace with Spain at Utrecht in July 1713, by ye 16th Article, of which, It is agreed to be well & truly executed according to the Tenor thereof, in all things relating to Captures made in the British or Northern Seas, or elsewhere.

So that it is very plain by this Treaty with Spain that ye British Seas must be extended beyond the Chops of the Channel, tho' ye Boundaries are not expressed in the Treaty.

Since therefore it is allow'd by the King of Spain's Advocate, that the British Seas to ye Southward are bound by the Coasts of Spain.

Since the Treaty with Holland in 1673, the Dutch have agreed to Strike their Flag in any Seas as far as Cape Finisterre, which must be taken to be in acknowledgment of ye British Sovereignty in these Seas.

Since by their Lordships Instructions to the Captains of His Majesties Men of War, His Majesty's Seas are Declared to Extend to Cape Finistre.

And Since it do's not appear by any Treaty between Great Britain & Spain either written or printed, that the extent of the British Seas is otherwise Specify'd or Agreed between the two Crowns;

These are Reasons to induce me to think that y British Seas mentioned in the first Limitation of Convention of Cessation with Spain, may be taken to extend as far as Cape Finisterre.

6 But this is humbly Submitted to their Lordships Consideration Whose Long Experience & Compleat Knowledge in Marine Affairs, wich enable them to form a Right Judgment in this point, which has not yet been Settled by any Treaty that I kno' of.

I am,

Sr.

Your most humble Servt.

H. Penrice

Drs. Comons

June ye 16th 1721.

* * *

Maine *et al.* Ex. No. 657

C 66/3339, No. 22 Patent Rolls.
[Patent to Neale for wrecks, etc. within 20 leagues of Bermuda, 1690.]

* * *

1 Grant to Thomas Neale of Wrecks jetsam flotsam lagan goods derelict riches gallion plate gold silver coyne barrs and piggs of silver ingotts of gold merchandise and other goods and chattels whatsoever which at any time before 25 June 1688 have been cast away wrecked or lost in or upon any of the rocks shelves shoals seas or banks within 20 leagues of our Isle of Bermuda in America and which at any time before 26 June 1694 shall be taken up gotten or recovered by Thomas Neale his agents substitutes or assigns reserving to the King and Queen one full tenth of all such wrecks jetsam flotsam lagan goods derelict riches gallion plate gold silver coyne barrs and piggs of silver ingotts of gold merchandise and other goods and chattels whatsoever . . . . they to sail to the parts mentioned and search for take receive and possess themselves
2 of the same . . . . Thomas Neale forthwith or as soon as conveniently may be cause a voyage for the parts aforementioned at his own costs, the goods recovered to be brought to the port of London, Governors and officers of the Islands to assist them. Dated 25 November [1690].

* * *

Benedict, Erastus C., 4 *The Law of American Admiralty: Its Jurisdiction and Practice,* pp. 360-62, 367-70 (1940).

* * *

367 **§ 683. Inquisition at Quinborough. II.**

"Heads of the Articles of the Inquisition, taken at Quinnborow in the year 1376, in the 49th of King Edward the Third, by eighteen expert seamen, before William Nevil, Admiral of the North, Philip Courtney, Admiral of the West, and the Lord Latimer, Warden of the Cinque Ports.

"I. OFFENCES AGAINST THE KING AND KINGDOM.

"1. Of such as did furnish the enemy with victuals and ammunition, and of such as did traffic with the enemies without special licence.

"2. Of Traytors goods detained in ships and concealed from the King.

"3. Of Pirates, their receivers, maintainers and consorters.

"4. Of murthers, manslaughters, maimes and petty felonies, committed in ships.

"5. Of ships arrested for King's service; breaking the arrest; and of sergeants of the admiralty, who for money discharge ships arrested for the King's service; and of mariners who having taken pay run away from the King's service.

"II. OFFENCES AGAINST THE PUBLIC GOOD OF THE KINGDOM.

"1. Of ships transporting gold and silver.

"2. Of carrying corn over sea without special licence.

368 "3. Of such as turn away merchandises or victuals from the King's ports.

"4. Of forestallers, regrators, and of such as use false measures, balances, weights, within the jurisdiction of the admiralty.

"5. Of such as make spoil of wrecks, so that the owners, coming within a year and a day, cannot have their goods.

"6. Of such as claim wrecks, having neither charter nor prescription.

"7. Of wears, riddles, blindstakes, water mills, etc., whereby ships and men have been lost or endangered.

"8. Of removing anchors, and cutting of buoy-ropes.

"9. Of such as take salmons at unreasonable times.

"10. Of such as spoil the breed of oysters, or drag for oysters and mussels at unreasonable times.

"11. Of such as fish with unlawful nets.

"12. Of taking royal fishes, *viz.*, whales, sturgeons, porpoises, etc., and detaining one half from the King.

"OFFENCES AGAINST THE ADMIRAL, THE NAVY, AND DISCIPLINE OF THE SEA.

"1. Of judges entertaining pleas of causes belonging to the Admiral, and of such as in admiralty causes sue in the courts of common law, and of such as hinder the execution of the Admiral's process.

"2. Of masters and mariners contemptuous to the Admiral.

"3. Of the Admiral's shares of waifs or derelicts, and of deodands belonging to the Admiral.

"4. Of *Flotsom, Jetson* and *Lagon,* belonging to the Admiral.

"5. Of such as freight strangers' bottoms, where ships of the land may be had at reasonable rates.

* * *

369 **§ 685. Statute of 1389. 13 Richard II, Cap. 5.**

So strengthened, the Admiralty encroached upon other jurisdictions and usurped that which did not belong to it. Complaints were made to the King, not of the Admirals exercising their ancient jurisdiction in all maritime matters, but that within the bodies of the counties of the nation they took jurisdiction of trespasses, house-breaking,

carrying away goods on land, of the King's deodands and wrecks; of regulating the prices of provisions, the wages of labor, and other things of this sort, interfering with the every-day business of the common people on land. This produced, in the year 1389, the statute 13 Richard II, cap. 5, re-enacting the proper maritime law, and the usage of the time of Edward III., as follows:

> "*Item.*—Forasmuch as a great and common clamor and complaint hath been oftentimes made before this time,
370 and yet is, for that the Admirals and their deputies hold their sessions in divers places within the realm, as well within franchise as without, accroaching to them greater authority then belongeth to their office, in prejudice of our Lord the King, and the common law of the realm, and in diminishing of divers franchises, and in destruction and impoverishing of the common people, it is accorded and assented, that the Admirals and their deputies shall not meddle from henceforth of anything done within the realm, *but only* of a thing done upon the sea, as it hath been used in the time of the noble prince, King Edward, grandfather of our Lord the King, that now is."

"*But only,*" is another phrase for *unless* or *except,* and if either of those words had been used (the realm of England including all the British seas), there would hardly have been any dispute about the meaning of this Act. The Admiral "shall not meddle of anything done within the realm, except of a thing done upon the sea, as it hath been used in the time of King Edward III," was evidently intended only to enforce the ancient maritime jurisdiction, and to cut off the new usurpations of the Admirals on the land, and not on the water, to the prejudice of the King's perquisites, in diminishing the franchises of the lords, and

impoverishing the common people, who were thus subject to double exactions.

* * *

Maine *et al.* Ex. No. 668

Bingham, Joseph Walter, etc., *Joint Memorandum in Support of Rehearing in United States v. Texas,* 3 Baylor L. Rev. 319-35 (1951).

* * *

319

JOINT MEMORANDUM IN SUPPORT OF REHEARING IN UNITED STATES v. TEXAS

By

Joseph Walter Bingham
C. John Colombos
Gilbert Gidel
Manley O. Hudson
Charles Cheney Hyde
Hans Kelsen
William E. Masterson
Roscoe Pound
Stefan A. Riesenfeld
Felipe Sanchez Roman

320 JOSEPH WALTER BINGHAM: Chairman, The International Law Association Committee on Rights in the Sea Bed and its Subsoil, American Branch; Professor of International Law, Stanford University, 1907-1944; author, *Report on the International Law of Pacific Coastal Fisheries* and numerous articles on international law.

WILLIAM W. BISHOP, JR.: Assistant to Legal Adviser Department of State, 1939-1947; Legal Adviser United States Delegation Council of Foreign Ministers and Paris Peace

Conference, 1946; author: *The Exercise of Jurisdiction for Special Purposes in High Sea Areas Beyond the Outer Limit of Territorial Waters*, 1949.

C. JOHN COLOMBOS: King's Counsel; Rapporteur, International Law Association's Committee on Neutrality, 1924, 1926, 1928, and 1932; author, *International Law of the Sea* (1943), *A Treatise on the Law of Prize* (3rd ed. 1949), and other works on international law.

GILBERT GIDEL: Member of the Institute of International Law; President of the Curatorium of the Academy of International Law at The Hague; French delegate, 1930 Hague Conference for Codification of the Law of Territorial Waters; author, *Le droit international public de la mer (The Public International Law of the Sea)* (1932-1934), 3 vols. (4th volume in preparation).

MANLEY O. HUDSON: Member and first chairman, United Nations International Law Commission; Judge Permanent Court of International Justice, 1936-1946; American adviser, 1930 Hague Conference for the Codification of International Law; Bemis Professor of International Law, Harvard University, 1923 to present; author of over 300 articles and publications on international law.

CHARLES CHENEY HYDE: Former Solicitor of the Department of State under Secretaries Hughes and Kellogg; Professor of International Law and Diplomacy, Columbia University, 1925-1945; author, *International Law, Chiefly as Interpreted and Applied by the United States* (2nd rev. ed. 1945), 3 vols., and other works on international law; President of the American Society of International Law, 1946-1949.

HANS KELSEN: Legal adviser to the Austrian Government and draftsman of the Federal Constitution of Austria, 1919-1922; Member of the Constitutional Court of

Austria, 1921-1929; author, *General Theory of International Law* (1934), *General Theory of Law and the State* (1944), and other works on international law and jurisprudence.

WILLIAM E. MASTERSON: Department of State consultant, 1944-1947; adviser on research in international law, Harvard Law School; author, *Jurisdiction in Marginal Seas* (1929); co-author, *The International Law of the Future* (1944), and author of numerous articles on international law, constitutional law, and jurisprudence.

ROSCOE POUND: Professor of Jurisprudence and Dean of Harvard Law School, 1910-1936; Director of National Conference of Judicial Councils, 1938 to date; author of more than 850 books, articles, and addresses on jurisprudence, international law, constitutional law, etc.

STEFAN A. RIESENFELD: Professor of Law, University of Minnesota, 1938 to date; Special Consultant, Board of Economic Warfare, 1942-1943; author, *Protection of Coastal Fisheries Under International Law* (1942), and of numerous articles on international and comparative law in German and American legal periodicals.

FELIPE SANCHEZ ROMAN: Former member of the Permanent Court of Arbitration at the Hague; member of the Spanish National Academy of Jurisprudence and Legislation; Legal Adviser to Spanish and Mexican Governments; Professor of Civil Law at the Contral University of Madrid, 1916-1936.

321

JOINT MEMORANDUM

Based upon our individual research and consideration of the pleadings, briefs, and evidentiary materials, each of us has prepared a separate memorandum opinion on the title to the lands and minerals underlying the Gulf of Mexico within the original boundaries of the

State of Texas and the rules of international law applicable thereto. These memoranda were written at the request of the Attorney General of Texas prior to the Court's decision of June 5, 1950.

321 Without collaboration, each of us concluded:

1. The Republic of Texas, as an independent nation, had full sovereignty over and ownership of the lands and minerals underlying that portion of the Gulf of Mexico within its original boundaries three leagues from shore.[1] Under international law and under the domestic law adopted by the Republic of Texas, the ownership *(dominium)* of the subjacent soil and minerals was severable from the paramount governmental powers (*imperium*) employed in the original acquisition and in the regulation and control of commerce, navigation, defense, and international relations.

2. The transfer of national sovereignty and governmental powers relating to interstate and foreign commerce, navigation, defense, and international relations from the Republic of Texas to the United States in 1845 did not effect a transfer or relinquishment of the ownership of the
322 lands and minerals above described. International law, as it existed in 1845, did not imply or require a cession of these proprietary rights with a transfer of national sovereignty.

3. The Republic of Texas, upon annexation, did not cede to the United States the ownership of the controverted 2,608,774 acres of lands and minerals within its original boundaries, but specifically retained this ownerhip

[1] The First Congress of the Republic of Texas, on December 19, 1836, fixed the boundaries as follows: ". . . beginning at the mouth of the Sabine River, and running west along the Gulf of Mexico three leagues from land, to the mouth of the Rio Grande." 1 Laws, Republic of Texas, p. 133; 1 Gammel's Laws of Texas 1193-1194.

under the terms of the agreement between the Republic of Texas and the United States.

322 4. A contrary position, first asserted by the United States 103 years after the international agreement of annexation, creates a dispute as to the meaning of the controlling documents. Under such circumstances either litigant should be entitled to present evidence bearing upon the intention of the contracting parties.

5. Available evidence of the status of international law, reflected by the customs, usages, and practices of nations in 1845 and since that date, will support the foregoing conclusions of fact and law.

After studying the majority and dissenting opinions of June 5, 1950, each of us has written a separate memorandum directed to issues raised by the majority opinion which we respectfully submit require a rehearing and judgment for Texas or at least a trial on the evidence. In the interest of brevity, this joint memorandum is submitted as a summary of our individual opinions and of the evidence of relevant customs, usages, and practices of nations which we will develop fully if given the opportunity at a trial of the case on its merits.

323 *JOINT MEMORANDUM*

I.

In the first instance, the majority opinion in its concept of the nature of a nation's sovereignty over and ownership of marginal belt lands and minerals is not in harmony with international law as it existed in 1845 and as it continues to exist at the present time.

The majority has written:

> ". . . once low-water mark is passed the international domain is reached. Property rights must

> then be so subordinated to political rights as in substance to coalesce and unite in the national sovereign. . . ."[2]

323 There is no accepted authority in international law for this notion of "international domain." To the contrary, it may be said that customs, usages, and practices of nations in and since 1845 indicate complete agreement that the territorial marginal sea and its subjacent soil and resources within its boundaries are under the full sovereignty of the littoral nation, subject only to the accepted rules of "innocent passage" through the overlying waters.

Under international law as it existed in and since 1845, the "international domain" did not, and does not now, begin at the low-water mark of a littoral state. *Vis-a-vis* other nations, the area of a littoral state between low-water mark and the seaward limit of its marginal belt was and is in the same category as its inland waters, uplands, and other ter-
324 ritory within its boundaries.[3] As said by Wheaton in 1836,

> "Within these limits, its rights of property and territorial jurisdiction are absolute and exclude those of every other nation." Wheaton, *Elements of International Law* (Philadelphia, 1836) 142-143.

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[2] 70 S. Ct. at 924.

[3] The only limitation or exception is that by mutual consent and established practice there exists a right of "innocent passage" for ships of other nations. But as said by the Italian publicist, Scipione Gemma: "The limitations implied by the right of innocent passage of foreign vessels and by certain exemptions applicable to them in matters of civil and criminal local jurisdictions exercised by the coastal nations are not enough to consider the littoral sea as something different from the national territory." Gemma, *Appunti di diritto internazionale* (Bologna, 1923) 187.

Sala wrote in 1845 that customs and usages of nations have "converted the sea as to this portion thereof into property no different than the lands occupied by them."[4] Hautefeuille described territorial seas as under littoral state dominion "in the same manner and by the same title as the land."[5] Many writers term it a continuation of the continental territory. Olivart says "the jurisdiction of the state over its territorial sea is exclusive as it is over its land territory."[6] Among the jurists and publicists there
325 is almost complete unanimity of opinion on this point.[7]

It is respectfully urged that no matter what the United States may gain in this case by a holding that the Texas marginal sea is "international domain," such gain could be far outweighed by the consequent gratuity to other nations. Implicit in the denomination of the area as "international domain" is the possibility of other nations having rights

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[4] Sala, *Sala Mexicana, o sea La Ilustracion al Derecho Real de España* (Mexico, 1845), vol. 2, p. 11.

[5] Hautefeuille, *Des droits et des devoirs des nations neutres en temps de guerre maritime.* (Paris, 1848) 231. He continued: "There is continuous, complete, and absolute possession, as there might be of a river, a lake, or a piece of land territory." (p. 232.)

[6] 1 Olivart, *Tratado de Derecho Internacional Público* (Madrid, 1903) 204.

[7] See "Summary of Available Opinions of Jurists and Publicists – 1670-1950," pp. 18-50 of the Appendix to Brief for the State of Texas in Opposition to Motion for Judgment. See especially quotations from Molloy and Pufendorf (p. 18), Vattel (p. 19), Lampredi (p. 20), Rayneval (p. 21), Azuni and Schmalz (p. 22), Wheaton (p. 24), Cussy and Gardner (p. 27), Casanova (p. 29), Field (p. 30), Fiore and Martens (p. 31), Pradier-Fodére (p. 33), Hershey (p. 38), Fenwick and Möller (p. 43), Bustamante (p. 45), Gidel and Baldoni (p. 46).

therein other than innocent passage through the waters. Spain, Mexico, France, England, Russia, and other nations can make no reasonable assertion of an interest in the oil and other minerals within the three-league Gulfward boundary of Texas so long as this Court recognizes that the area was removed from international domain when it became a part of the Republic of Texas. This was accomplished by the Republic of Texas in accordance with international law as recognized at the time by the countries named and by all other civilized nations. A contrary conclusion by the United States Supreme Court could well be used by other nations as an opening for claims not now asserted.

The Court's holding in this regard is contrary to the official position of the United States as expressed by the De-
326 partment of State and by Presidential Proclamations. The official view of the United States at the League of Nations Conference at The Hague in 1930 was declared as follows:

> "... the sea-bottom and subsoil covered by the territorial waters, including fish and minerals, are the property of the United States or the individual states where they border." [8]

The Continental Shelf Proclamations and Executive Orders of the President of the United States on September 28, 1945, do not regard the bed of the continental shelf as "international domain." On the contrary, the Proclamation regards the land and resources below low tide "as an extension of the landmass of the coastal nation and thus naturally appurtenant to it" and wholly unaffected by "the character as high seas of the waters above the

[8] Reply of the United States to the Bases of Discussion, March 16, 1929, League of Nations Conference for the Codification of International Law, Bases of Discussion, C. 74. M. 39. 1929. V. p. 128.

continental shelf and the right to their free and unimpeded navigation."[9] The Executive Order recognizes that ownership of the subsoil and sea-bed is possible either in the States or the United States.[10]

There is no authority in international law for the doctrine that property rights in the marginal sea must "be so subordinated to political rights as in substance to coalesce and unite in the national sovereign." On the contrary, in-
327 ternational law in and since 1845, and all domestic law with which we are acquainted, recognizes that political rights (*imperium*) are separate and severable from property rights *(dominium)* in the subsoil and minerals of the marginal belt the same as in any other soil and minerals within a nation's territory.[11] The use of the soil may be more limited by governmental restrictions and regulations designed to protect public use, innocent passage, and navigation of the waters generally, but restrictions and regulations on property use have not been understood to vest ownership of the property in the governmental power which imposes the restrictions and regulations.

There is no obligation or responsibility of a nation to other nations which requires it, rather than one of its political subdivisions, to own the soil and minerals within its territorial marginal belt, so long as it has governmental

[9] 3 C.F.R., 1945, Supp., Proc. 2667, 13 Dept. State Bull. 484, 485 (1945).

[10] 3 C.F.R., 1945, Supp., E.O. 9633.

[11] It is believed that evidence of the practice of nations in 1845 will show that they treated original ownership of the subsoil and minerals of the marginal belt as within the same legal regime and property law as was applicable to other unsold and unappropriated lands within their boundaries.

powers which guarantee innocent passage for ships of other states. The exercise of this responsibility and all other responsibilities connected with foreign and interstate commerce, defense, and international relations, is wholly separate from and does not depend upon the economic use and profits connected with the proprietorship of this subsoil and minerals any more than it does the subsoil and minerals beneath uplands, inland waters, and all areas of the nation's territory.

328 Such was the status of international law when the Republic of Texas and the United States entered into their agreement for the annexation of Texas. A transfer of marginal sea lands and minerals was not then implied in a transfer of national sovereignty. An express cession or other clear terms indicating a transfer of these proprietary rights was as necessary then as it would be now to effect such a result. As recently said by one of the co-authors of this memorandum:

> "In this day when world governments are being planned it is important that *dominium* is not confused with or inextricably tied to *imperium*. . . .
>
> "Assume that all of this nation's powers of external sovereignty, international relations, and defense were transferred to a United Nations of the World. This transfer of external sovereignty should not be held to carry with it any proprietary rights theretofore acquired by the United States in the marginal belt of the original States and California in the absence of a cession of the property.
>
> "Such is the situation which existed between Texas and the United States in 1845.

> Texas transferred its external sovereignty and certain enumerated properties which then pertained to its national defense. It ceded no other property. This is confirmed by a specific reservation of all 'vacant and unappropriated lands lying within its limits.' The subsoil and minerals remained in the State just as the subsoil and minerals of the California belt would remain in the United States if it should transfer external sovereignty to a larger federation of States without ceding its rights of a proprietary nature beneath
329 the marginal sea of California."[12]

II.

Even if the Court believes that the lands and minerals in question would ordinarily pass to the United States with national political rights, this would not be true if the parties made an agreement to the contrary at the time of annexation.

In this case there is an international agreement which contains a specific retention of lands lying within the limits of the Republic of Texas.[13] It is of the same nature and has the same effect as a treaty or contract between independent nations. Therefore, rules of interpretation applicable to treaties, conventions, and other international agreements apply. The object of the interpretation of an agreement of this nature is to discover the understanding and intention of the parties at the time the contract or agreement was entered into.

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12 Roscoe Pound, "Rights Involved in United States v. Texas," pp. 10-11, Memoranda and Appendix, Brief for the State of Texas in Opposition to Motion for Judgment.

13 5 Stat. 797; 2 Gammel's Laws of Texas 1225, 1228.

Texas has a specific allegation at page 15 of its First Amended Answer that:

> "By these acts on the part of the United States and the Republic of Texas, when construed, as they must be, in the light of the intention of the contracting parties, there was a binding agreement between the two independent sovereigns that upon annexation Texas would not cede to the United States any, but that the newly created State would retain all, of the lands, minerals, and other things lying beneath that part of the Gulf of Mexico within the original boundaries of the Republic, as well as the right to take, use, and develop the lands and minerals, subject only to the dominion and paramount powers of the United States as recognized in section 2, paragraph II above."

If it be found, as alleged by Texas, that the parties intended by the terms of the agreement that the lands and minerals beneath the marginal belt were to be retained by Texas the same as other lands and minerals within its limits, no other provision of the agreement should be permitted to defeat this intention. Thus, a controlling issue in this case is the fact question of whether the parties intended the retention clause to be effective to the extent of the "limits" of Texas, as the terms imply, or only as far as low-water mark.

The applicable rule in such cases is stated in the majority opinion as follows:

> ". . . If there were a dispute as to the meaning of documents and the answer was

> to be found in diplomatic correspondence, contemporary construction, usage, international law and the like, introduction of evidence and a full hearing would be essential."[14]

If this case is not determined in favor of Texas on the law and terms of the documents alone, it should not be determined against Texas without allowing it the opportunity for introduction of evidence and a full hearing. It is our
331 opinion that the answer to the dispute will be found in diplomatic correspondence, contemporary and subsequent construction, usage, and international law under which the parties were dealing in 1845.

In so far as international law is concerned, it was possible in 1845 for one nation to join another and retain the lands and minerals underlying the marginal sea within its boundaries.

This was and is possible also in so far as the domestic law of the United States is concerned. Counsel for the United States itself have not contended that ownership of the marginal belt lands and minerals is an inseparable attribute of national sovereignty.[15] In the Government's brief in *United States v. California*, 332 U.S. 19 (1947), it was said:

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[14] 70 S. Ct. at 922.

[15] Solicitor General Perlman, in answer to a question by Mr. Justice Reed during the argument on the Motion for Leave to File the Complaint herein, said that if the United States owns the property, it could convey it to the States. His words:

> "Oh yes, Congress could give whatever title it has, whatever rights it has, to the States." Argument, *United States v. Texas*, May 9, 1949, Reporter's Transcript, p. 6.

> "We do not argue that the effective exercise of the foregoing powers (national defense, commerce, international relations) granted to the Federal Government by the Constitution would be impossible without ownership of the marginal sea." (p. 89.)

The Court, in that case, also recognized that ownership of this property is not a necessary incident of national sovereignty or essential to the exercise of federal constitutional powers over the area, when it said that the power of Con-
332 gress to deal with such property "is without limitation."[16]

Implicit in the powers of the United States Congress to convey these lands and minerals to the states and good faith claimants and to admit new states is the power to admit Texas to the Union under an agreement that Texas retain the lands and minerals in the first instance.

The Texas Annexation Agreement of March 1, 1845, whether classed as a treaty, act, or joint resolution, was passed by Congress and carried into effect by the President, who is charged with the conduct of international affairs. This agreement provides that:

> ". . . said state, when admitted into the Union . . . shall also retain all the vacant and unappropriated lands lying within its limits . . . ."

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16 *United States v. California,* 332 U.S. 19, 27. Also in stating that valuable improvements made in good faith under State titles are not ground for a different judgment, the Court added: "But beyond all this we cannot and do not assume that Congress, which has constitutional control over Government property, will execute its powers in such way as to bring about injustices to states, their subdivisions, or persons acting pursuant to their permission. See *United States v. Texas,* 162 U.S. 1, 89, 90; *Lee Wilson & Co. v. United States,* 245 U.S. 24, 32." *Id.* at 40.

Thus as to Texas, Congress has acted with regard to the specific question before this Court. The Congress of Texas, and the people in convention assembled, agreed to annexation with this as one of the "conditions" and "guarantees."[17] There is no evidence in the terms of the agreement that
333 the parties meant to retain only those lands lying above low tide on the coast. The retention clause says "*lands lying within its limits.*" Neither is there any evidence in the terms that the parties intended the lands and minerals of the three-league marginal belt to "coalesce and unite" with the political powers of national sovereignty transferred to the United States. Under the domestic law of the Republic of Texas, these lands and minerals involved rights of property, severable from sovereignty, but orignally held by the sovereign in trust for the people.

The constitution of the new State, adopted in accordance with the terms of the annexation agreement and as a part of the annexation procedure, indicates that these property rights were to remain as they were under the laws of the Republic of Texas. It included this provision:

> "The rights of property . . . which have been acquired under the Constitution and laws of the Republic of Texas . . . shall remain precisely in the situation which they were before the adoption of this Constitution."[18]

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17 5 Stat. 797; 2 Gammel's Laws of Texas 1225, 1228. The Annexation Resolutions of the two nations are set out at length on pages 58-62 of the Appendix to Brief for the State of Texas in Opposition to Motion for Judgment.

18 Art. VII, Sec. 20, Constitution of 1845; 2 Gammel's Laws of Texas 1293-94.

This Constitution was laid before the United States Congress and was approved by that body in the final Act of Admission as being "in conformity to the provisions" of the annexation resolution. 9 Stat. 108.

On the basis of these documents it would appear that Texas retained the lands and minerals in question by the specific agreement and approval of the United States Congress. The only doubt cast on the meaning of the docu-
334 ments is the contention by the United States that the "retention clause" was not intended to include lands and minerals below low tide and the statement in the majority opinion that an "equal footing" clause in the annexation resolution of March 1, 1845, effected a relinquishment of the property to the United States.

The "equal footing" clause in the March 1 resolution for annexation of Texas was contained in Section 3, which was an alternative proposal never submitted to, or considered or accepted by, Texas. Sections 1 and 2 contained the "proposals, conditions, and guarantees" submitted by the President of the United States and accepted by the Congress and the people of Texas. These sections provided that Texas retain its lands and pay its own debts. It is significant that they contained no "equal footing" clause. Only the unilateral final act of admission referred to "equal footing," but it also recited that admission was granted in accordance with the "proposals, conditions, and guarantees contained in the first and second sections" of the March 1, 1845, annexation resolution. It could not have the effect of taking from Texas lands and minerals which had been specifically retained by the "proposals, conditions, and guarantees" theretofore agreed upon. Texas pleads that it has evidence which will show that no such meaning or effect was intended by the contracting parties.

If, upon rehearing, judgment is not rendered in favor of the State of Texas on the basis of the terms contained in Sections 1 and 2 of the annexation agreement and its failure to cede the lands and minerals, it would indicate that some doubt still exists in the minds of the majority as to the meaning of the annexation agreement and the in-
335 tention of the parties. In that event, Texas should be entitled to an opportunity to present its evidence. This was requested by Texas in its motion for the appointment of a Master and in its brief in opposition to the motion of plaintiff for judgment on the pleadings. We submit that the Court should reconsider its ruling denying Texas this opportunity to develop evidence as to the intention of the parties to this international agreement.

Evidence which can and will be submitted as to the customs, usages, and practices of nations in and since 1845, the nature of the sovereignty over and ownership of marginal belt lands and minerals in international law, and all other relative interpretative matters, will support the contentions of the State of Texas as to the law and facts applicable to this case.

Respectfully submitted,

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July 14, 1950

CONCURRENCE

Time has not permitted me to assist in the preparation of this memorandum, but I am fully in accord with the position taken by the State of Texas in its brief and argument in this case. I wholeheartedly concur in the opinion that there should be a rehearing, and a judgment for Texas or at least a trial on the evidence.

WILLIAM W. BISHOP, JR.

July 15, 1950

Maine ***et al.*** **Ex. No. 673**

Bollan, William, ***The Ancient Right of the English Nation to the American Fishery,*** **pp. 1-4, 8-13, 20-25, 34-50, 55, 82-100, 103-05 (1764).**

* * *

1 ALL things are small in their beginnings, *Amsterdam,* says the *Dutch* proverb, stands upon herring bones, and the *American* fishery from *Sebastian Cabots* taking up the first cod with *European* hands having long since so far encreased as to raise a very large number of able seamen, I purpose to set forth the original right of the *English* nation to this fishery, with the various diminutions thereof by royal grants, encroachments and cessions, in order to illustrate this matter, wherein the *British* naval power is so nearly concerned.

King *Henry* the Seventh made the following grant, to wit,

* * *

"The king to all to whom, &c. Greeting.

"Be it known and manifest that we have given and granted,
2 and by these presents do give and grant, for Us and our heirs, unto our beloved *John Cabot,* citizen of *Venice,* and to *Lewis, Sebastian* and *Sanctus,* sons of the said *John,* and to the heirs and deputies of them and each of them, full and free authority, leave and power of sailing to all parts, regions and bays of the east, west, and north sea, under our banners, standards and ensigns, with five ships or vessels, of whatever burthen and quality they be, and with as many and such sailors and men, as they shall be willing to take with them in the said ships, at their own proper charges and expences.

"*To find out, discover and investigate whatsoever islands, countries, regions or provinces of gentiles and infidels, in whatever part of the world situated, which were unknown to all Christians before these times.*

"We have also granted to them, and to every of them, and
3 to the heirs and deputies of them and every of them, and have given licence, to affix our aforesaid banners and ensigns in whatever village, town, castle, island, or firm land by them newly found.

"And that the beforenamed *John* and his sons, or the heirs and deputies of them, may subdue, occupy and possess all such villages, castles, towns and islands by them found, as can be subdued, occupied and possessed as our vassals and governors, lieutenants and deputies of the same, acquiring to us the dominion, title and jurisdiction of the said villages, castles, towns, islands and firm land so found."

Before the *Spaniards* had discovered that there was any continent in the western part of the world *Sebastian Cabot*, proceeding under this authority, discovered the island of *Newfoundland*, together with the continent, from the 56th
4 or 58th to the 28th degree of north latitude.

* * *

[8] *NEWFOUNDLAND*, with the adjacent countries, islands, and fisheries, was in a manner the most notorious by Sir *Humphrey Gilbert* more clearly annexed and fully brought under subjection to the crown of *England*, of which we have a particular relation given by Mr. *Edward Hayes*, whereby it appears that on the 11th of *June* Sir *Humphrey* sailed with five ships manned with about 260 men, from *Causet* bay, near *Plymouth*. The largest, burthen 200 tons, named the *Rawley*, was vice admiral, and fitted out by the illustrious person whose name she bore, who was half brother to Sir *Humphrey*. Mr. *Hayes* was captain and owner of the ship *Golden Hinde*, the rear admiral. On the 3d of *August* having entered and come to an anchor in the harbour of *St. John*, the captains and masters repaired on board their admiral, "whither," to proceed in the authors words, "also came immediately the masters and owners of the fishing fleet of *Englishmen*, to understand the general's intent, and cause of our arrival there. They were all satisfied when the general had shewed his commission, and purpose to take possession of those lands to the behalf of the crown of *England*, and the advancement of *Christian* religion in those *Paganish* regions, requiring but their lawful aid for repairing of his fleet, and supply of some necessaries, so far as conveniently might be afforded him, both out of that and other harbours

9 adjoining. In lieu whereof he made offer to gratify them with any favour and privilege which upon their better advice they should demand, the like being not to be obtained hereafter for greater price. So craving expedition of his demand, minding to proceed further South without long detention in those parts, he dismissed them, after promise given of their best endeavour to satisfy speedily his so reasonable request. The merchants with their masters departed, they caused forthwith to be discharged all the great ordnance of their fleet in token of our welcome."

"It was further determined that every ship of our fleet should deliver unto the merchants and masters of that harbour a note of all their wants; which done the ships, as well *English* as strangers, were taxed at an easy rate to make supply. And besides, commissioners were appointed, part of our own company, and part of theirs, to go into other harbours adjoining (*for our* English *merchants command all there*) to levy our provision; whereunto the *Portugals* (above other nations) did most willingly and liberally contribute; insomuch as we were presented (above our allowance) with wines, marmalads, most fine ruske or bisket, sweet oils, and sundry delicacies." After mentioning what is at present immaterial, the author says that, on monday following, the general had his tent set up, who being accompanied with his own followers, summoned the merchants and masters, both *English* and strangers, to be present at his taking possession of those countries. Before whom openly was read, and interpreted unto the strangers, his commission; by virtue whereof he took possession in the same harbour of St. *John*, and 200 leagues every way, invested the queens majesty with the title and dignity thereof, had delivered unto him (after the custom of *England*) a rod and a turf of the same soil, entering possession also for him, his heirs and assigns for ever: and signified unto

all men, that from that time forward they should take the same land as a territory appertaining to the queen of *England*,
10 and himself authorized under her majesty to possess and enjoy it, and to ordain laws for the government thereof, agreeable (so near as conveniently might be) unto the laws of *England*, under which all people coming thither hereafter, either to inhabit or by way of traffick, should be subjected and governed.

* * *

"These contents published obedience was promised by general voice and consent of the multitude as well of *English* men as strangers, praying for continuance of this possession and government begun. After this the assembly was dismissed; and afterward were erected not far from that place the arms of *England*, ingraven in lead, and infixed upon a pillar of wood. Yet further and actually to establish this possession taken in the right of her majesty, and to the behoof of Sir *Humphrey Gilbert* knight, his heirs and assigns for ever, the general granted in fee farm divers parcels of land lying by the water side, both in this harbour of St. *John*, and elsewhere, which was to the owners a great commodity, being thereby assured (by their proper inheritance) of grounds convenient to dress and to dry their fish, whereof many times before they did fail, being prevented by them that came first into the harbour. For which grounds they did convenant to pay a certain rent and service unto Sir *Humphrey Gilbert*, his heirs or
11 assigns for ever, and yearly to maintain possession of the same, by themselves or their assigns.

* * *

12 The grant and authority in virtue whereof Sir *Humphrey Gilbert* proceeded were made and given to him by letters patent issued under the great seal of the kingdom; and it is to be remembered that the territorial jurisdiction which was thus established in the crown of *England* comprises all those portions of the main land which in part surround and form the great bay or gulph, as well as the gulph, together with the island of *Newfoundland*, and all the adjacent islands seas and fishing-banks; and moreover extends so far as to comprise the country of *Nova Scotia*, according to its limits
13 given by the grant to Sir *William Alexander*. And it is to be noted that at the time of this proceeding, or at any other time during the reign of queen *Elizabeth*, no other *Christian* prince had possession of any part of the land thus comprised. It may be observed that in consequence of *Sebastian Cabots* discovering the country of *Baccalaos*, and his return with the tidings to *Europe*, the *Portuguese*, *Spanish* and *French*, as well as *English* fishermen resorted early to the new found land, of which descriptive words an appellative was in time formed by the *English*, and appropriated to the great island which was the chief seat of this fishery, and *Stephen Parmenius* says that when Sir *Humphrey Gilbert* entered *St. Johns* harbour they found about twenty *Portugal* and *Spanish* ships there, besides the ships of the *English*.

* * *

Maine *et al.* Ex. No. 675

Burchett, Josiah, *A Complete History of the Most Remarkable Transactions at Sea*, preface, pp. 21-22, 26-28, 34-37 (1729).

* * *

[26] . . . Sovereignty upon better reason may be claimed by absolute Kings and Princes in their several Seas, than by the Emperors of *Rome* over the *whole Ocean*, as well in respect to the Protection they afford to those who pass within the Limits of their Command, as of their many Years Prescription, whereby their Claims by length of time are settled and confirmed. And therefore now, when several Parts of that Empire are devolved to proprietary Lords by just and lawful Titles, to give notwithstanding all Men a common Interest in every Part of the Sea, and to put the Reins of Power over the same equally into the Hands of all Men, were not only injuriously to take away that which of right appertaineth to Princes, but also to dissolve the Bands of Order and Justice, which when once growing uncertain by whom or on whom to be exercised, forsakes the World, and gives place to all Violence and Confusion.

In Consideration whereof, later Civilians, of greatest Note and Learning, have been forced to acknowlege, that Seas, as well as the Land, have their peculiar Lords and Owners, and this even by the Law of Nations . . . (faith *Baldus*) . . .; that is, We see that by the Law of Nations there are distinct Dominions on the Sea, as well as on the dry Land. Nor is thus much confessed in general only, but some of them descend to more Particulars: As first for the Proportion of Extent, *Bartholus* assigns an hundred Miles of Sea (if the Breadth will carry it) to every Territory from the Main. Next, over this Proportion they not only give proprietary Lords Power, but in mannerly Terms tie them to undergo the Care of Protection. . . . All Princes and States have belonging to them the Protection of such Portion of the Sea as lies next to their Dominions. And lastly, they enforce a Right of Jurisdiction upon Princes in the Sea, which they cannot put off without renouncing those their

Territories upon which the Sea coasteth. For first, . . . that is, The nearest adjacent Islands, and the Sea itself, as far as a hundred Miles, are assigned for a Territory and District to that Country to which they lie nearest. And then . . . . Jurisdiction does as necessarily and tenaciously cohere with Territory, as Accident with Matter. So that if in the Sea there be distinct Dominions, and this Distinction express'd in a demonstrative Certainty, and in this Certainty Power given to Princes, both of Protection and Jurisdiction, what can be in effect more said, or more desired, for that Claim of Jurisdiction which Princes make in these our Days, to those Seas which wash the Coasts of their Kingdoms?. . . .

27 Insomuch as within this large Extent of Sovereignty, even the particular Power (so stiffly by some controverted) of restraining the Passage and Fishing within some Parts of the Sea, upon just occasion, is necessarily comprized and included: For since the Sea bordering upon any County is in the Nature of a Territory (as hath been before shewn) and that therein Princes by the Civil Law have a Right to impose and establish Laws, not only Enemies offering open Violence, but all others who shall refuse Obedience to such Orders and Conditions as by the rightful Owners are reasonably prescrib'd, may, by warrant of the Civil Law and Reason, be prohibited from passing within the same, until they shall regularly conform themselves. And as for the point of Fishing; whereas some object that therein not any one can have more Property than another, for that Fishes in the Sea are as the Birds in the Air, which cannot be appatronated, by reason of the Uncertainty of their Possession, being, as the Law saith, . . . yet it hath been allow'd to be warranted by the same Law, that. . . . The Owner of any Ground may prohibit the Entry of any Person who would go upon it, in order to fish or fowl. And therefore, by the same reason, he who is a proprietary Lord of

any bounded Part of the Sea, as annexed to his Crown, may lawfully prohibit Strangers from entering within the Limits of his Command, to take such Fish as are therein, the Maxim of the Law being, that . . . where the Reason is the same, so likewise is the Disposition of the Law. And this they may the rather do, for that Fishing, by the express Words of the Law, is acknowledged to be among the Regalties.

* * *

34 HAVING thus set before the Reader the most considerable of the Arguments, by which the Title of the Kings of *Britain* to the Sovereignty and Dominion of the *British* Seas may be made good from Prescription; it will be proper in the next Place to give some Account of the Extent
35 of those Seas. Their Boundaries on the East are the Shores of those Countries opposite to *Great Britain* on that side, *viz. Norway, Denmark, Germany,* and the *Netherlands,* by these Limits including that Part of the *British* Seas called the *German* Ocean, or North Sea. On the South they extend the opposite Shores of *France,* to those of *Spain* as far as Cape *Finisterre,* and to a Line drawn from that Cape, in the same Parallel of Latitude, to their Boundary on the West hereafter mention'd; thus taking in that Part of the *British* Seas which consists of the Chanel, the Bay of *Biscay,* and part of the *Atlantick* Ocean. For the West and North, if from the before-mention'd imaginary Line extending from Cape *Finisterre,* a Line be drawn, in the Longitude of twenty three Degrees West from *London,* to the Latitude of sixty three Degrees, and thence be drawn another, in that Parallel of Latitude, to the middle Point of the Land *Van Staten* in *Norway,* we may esteem these to be proper Boundaries of the *British* Seas on those Quarters, thereby taking in, to the West, that Part

of them which consists of part of the *Atlantick* Ocean, and the *Irish* Sea, or St. *George's* Chanel; and, to the North that called the *Caledonian* Ocean, or *Scotish* Sea: And tho' the same Boundaries on the East and South, *viz.* the Shores of the opposite Countries, are also the Limits of the Sea Dominion of the Kings of *Great Britain* that way; yet, to the West and North, does that Dominion extend very much farther than the fore-mention'd Boundaries of the *British* Seas on those Quarters. For tho' (as Mr. *Selden* says) (the vast Western and Northern Ocean (stretching out to so great a Latitude as to reach, on the one hand, the Shores of *America;* and, on the other, those of *Greenland,* and Parts utterly unknown) cannot all be called the *British* Seas, yet hath the King of *Great Britain* most ample Rights on both those Seas, beyond the Bounds of the *British* Name: As he most certainly has, even as far to the West, as *Newfoundland* and the adjacent Parts of North *America,* by virtue of first Invention and Occupancy thereof by *Sebastian Cabot* for *Henry* the VII, and of a more full Possession and Occupancy by Sir *Henry Gilbert* for Queen *Elizabeth:* And, to the North, as far as the Shores of *Greenland,* by virtue of the same Title of first Invention by Sir *Hugh Willoughby* for *Edward* the VI, and of the full Occupancy thereof, and the Discovery of the Use and Profit of those Seas in the Whale-Fishery, by the *English Muscovy*-Company, for Queen *Mary* and Queen *Elizabeth.* However within the Limits before laid down, ought ever to be required (and forced in case of Refusal) from all Ships or Vessels that the *British* Ships of War meet with on those Seas, the striking their Flag and lowering their Topsail; or, where they have no Flag, the lowering their Topsail only, in Acknowledgment of his Majesty's Sovereignty therein.

* * *

Maine *et al.* Ex. No. 676

Bruce, John (ed.), *Calendar of State Papers, Domestic Series, of the Reign of Charles I,* 1635-1636, pp. 31, 393, 416, 560-61 (1866).

* * *

31 48. Draft or copy of a proposed Proclamation, that the late King having in the 7th year of his reign set forth a proclamation, whereby all persons not natural born subjects were restrained from fishing on the English coasts without licence, his Majesty declares that his resolution is to keep such a strength of shipping upon the English seas as may hinder further encroachments upon his regalities, and protect such as shall have obtained licences.

* * *

416 May 10. 62. Proclamation for restraint of fishing without licence. Recites proclamation of King James set forth in the seventh year of his reign, whereby all persons were restrained from fishing on the coasts and seas of Great Britain until they had obtained licences from the said King, or his commissioners, in that behalf. Finding that the inconveniences which occasioned that proclamation are rather increased than abated, the King knowing how far he is obliged in honour and conscience to maintain the rights of his crown, thinks it necessary to renew the said restraint, and to make known his resolution to keep such a strength of shipping as may be sufficient to hinder encroachments upon his regalities, and protect those who shall thenceforth by virtue of licences first obtained endeavour to take the benefit of fishing on the King's coasts and seas.

* * *

Maine, *et al.*, Ex. No. 679

Bruce, John (ed.), *Calendar of State Papers, Domestic Series, of the Reign of Charles I,* 1631-1633, pp. 51-52, 230, 237-38, 243-46, 303, 384, 398-99, 479 (1862).

* * *

398 *Capt. John Pennington to Capt. Henry Stradling, of the Tenth Lion's Whelp. On return of the Second Whelp he is to take her along with his own ship, and range the sea to the westward as high as the Land's End or the Lizard, to free the same from pirates. He is to preserve the*

399 *King's regality in the Narrow Seas, to assist the customers, and give notice of his proceedings to the Lords of the Admiralty or to Nicholas. The Convertive, in the Downs, 1632, July 28.*

* * *

Maine, *et al.*, Ex. No. 680

Callis, Robert, *The Statute of Sewers,* pp. 39-55 (1685 ed.).

39 The Sea within the Realm of England.

FIRST, touching our *Mare Anglicum,* in whom the interest therein is, and by what Law the Government thereof is, is a fit question, and worth the handling. And in my Argument therein, I hope to make it manifest by many proofs and precedents of great worth and esteem, and the King hath therein these powers and properties, *videlicet.*

1. *Imperium Regale.*
2. *Potestatem legalem.*
3. *Proprietatem tam soli quam aquae.*
4. *Possessionem & Proficuum tam Reale quam Personale.*

And all these he hath by the Common Laws of *England:* in the 6th of *Richard* the Second, *Fitz. Prot. 46.* it is said, *That the Sea is within the Legiance of the King, as of his Crown of* England; This proves that on the Seas the King hath *Dominationem & Imperium ut Rex Angliae,* and this by the Common-law of *England.*

* * *

Imprimis, This Charter is under the great Seal of *England, quod est Lex Angliae.*

40 The King grants to the Admiral thereby power in Maritime Causes, which proves the King's legal power and jurisdiction on the Seas.

He grants to him *bona in mare deperdita super mare emergentia & extra mare projecta,* which be profits arising on the Sea.

And all these are said to be *per totum Regnum Angliae; Ergo,* the Seas be *infra Regnum Angliae.*

In the Eleventh Chapter *de Prerogativa Regis,* it is declared, *Quod Rex habebit wreccum Maris per totum Regnum & Balenas & Sturgiones captos in Mari vel alibi infra Regnum Angliae:* and this was by the Common Laws before ever this Statute was made; for as the King was and is the most Excellent Creature within his Realm, so the most Excellent things which Land and Sea afford are appropriate unto him. And this Statute also proves the Sea to be *infra Regnum Angliae,* and that the profits therein, and thereon arising belong to the King by the temporal Laws of *England.*

In the Case of Sir *Henry Constable* in the Fifth *Report* of Sir *E. Cook,* it is said, That *Flotsan, Jetsan and Lagan are goods on or in the Sea, and that they belong to the King, and the King by his Charter granted them to the Admiral.*

The Statute of the 18th of *Edward* the Third; *Let the Sea be open to all Strangers:* and the Statute of 28 H. 8. Chap. 15. *If any Treason, Murther, or other Felony be done on the Sea-coast, the Offenders shall be tried in such County as the King shall appoint by Commission to be directed to the Admiral and others, to try the same* per Sacramentum duodecim, which is by Jury.

And the Statute 31 *H. 6.* Chap. 4. there is a Restraint, That no Subject do attach any Stranger in amity within this Realm on the Sea.

Here the Statute-laws are in force on the Seas, as appears by the examples; but these seem to tie the Person onely.

41 And in the *Irish Reports* of Sir *John Davies,* in the Case of the Royal Piscary of the *Banne,* it is said, *That the Sea is the King's proper Inheritance.*

And Mr. *Bradson, lib. 2. cap.* 12. in his Title *de acquirendo rerum dominio,* setteth forth a prescription in these words, *Quod F.S. & antecessores sui fuerunt quiet de Theolonio & aliis consuetudinibus dandis per totum Regnum Angliae sam per terram quam per mare:* and many times in that Chapter he reiterates the same words; which is a strong proof that the Sea is *infra Regnum Angliae,* and that the King governs there by his Common Laws of *England;* for that prescription is a main and material point of the Common Law: And the like is alleg'd in Sir *Henry Constable's* Case by way of Custome in the Citizens, as of *Bristol,* to have *Flotsan* on the Seas between the high-water and the low-water Marks.

FOR THE PREROGATIVE AND INTEREST THAT THE KING OF *ENGLAND* HATH IN THE SEAS OF *ENGLAND,* AND THE ANTIQUITY OF THE COURT OF ADMIRALTY; SEE THE RECORD IN *CO.* 4 INST. 142.

So I take it I have proved the King full Lord and Owner of the Seas, and that the Seas be within the Realm of *England;* and that I have also proved it by Ancient Books and Authorities of the Laws, and by Charters, Statutes, Customs and Prescriptions, that the Government therein is by the Common Laws of this Realm.

One Case and one Statute seem to sway to the contrary, and that is *Lacy's* Case, where one was stricken on the Seas, and died on the Land, that the Common Law could not try this Murther: It is true, because that Trial was to be by Jury, which must come out of a proper County, which could not in this Case, because the Sea was not within County-ground, and so no Jury could be summoned there.

42 | And I acknowledge that the King ruleth on the Sea by the Laws Imperial, as by the Roll of *Oleron* and other; but that is onely in the particular Case of Shipping, and for Merchants and Mariners: But the King hath neither the property of the Sea, nor the real and personal profits there arising, but by the Common Laws of *England*, and in proof thereof the Book 15 and 16 *Eliz. in Dyer*, where the Grounds gained from the Sea pertained to the Queen;

AND IN SIR *JOHN DAVIS* HIS REPORTS, *PISCAR. DE BAN. 56.* THAT THE KING SHALL HAVE THE LAND GAINED OUT OF THE SEA.

Which must needs be by the Common Law of *England;* for no Law gives the King any Soil, but onely the Common Laws of *England;* so this is sufficient proof for the real profits, and for the personal profit the Charter of the Admiralty and other Cases aforesaid make it manifest.

And there is a Statute made in 13 *R.* 2, *cap. 5.* which restrains the Admiral that he do not meddle with any thing done within the Realm, but on the Seas; by which

it may be collected, that the Seas be not within the Realm of *England:* But in my opinion the intent of that Statute did rather limit the Admiral how far he should extend his Jurisdiction, than any way to set forth the bounds of this Realm: wherein my conclusion herein is, That my Statute hath his extent within all the Realm of *England;* and that English Seas being within the Realm, be within the bounds of my said Statute of Sewers, and that Statute-law is in full power on the Seas, as by the Cases and Statutes mentioned formerly doth appear.

* * *

44 But I do take the Isle of *Wight* originally to be parcel of *England*, and is a part of the County of *Hampshire*, and was as it were divorced from the Continent as was *Sicily* from *Italy;* the one, as Poets feign, was parted from the Continent or main Land by an Earthquake; the other, as is imagined, by the rage and violence of the Sea: *Insula Vectis inquit Cambdenus in suis insultis Britannicis, fol. 707, est pars Comitatus Hamtonie et àContinente Britanniae avulsa est ut cohaesisse videbatur*, for many do imagine that it was torn from the main Land by the violence of Waters, as of late years parcel of the *Spurnhead* in *Yorkshire*, which before did adhere to the Continent, was torn therefrom by the Sea, and is now in the nature of an Island: Yet the same is within the Realm of *England*, and remains parcel of *Yorkshire;* and the like is said of the Island call'd *Silly*. Many other ancient Islands there be, which being in the English Seas be parcel of this Realm, which I will pass over to avoid prolixity.

But in our Case a new Island is risen up in the English Seas, to whom the same in point of property and ownership shall belong, and what Laws the same shall be governed by, comes now justly to be disputed of. *Justinian* in his *Institutes, De rerum Divisione*, saith, *Quod insula in*

mari nata (ut Delos) est primi occupantis. And *Britton*, one of our ancient Writers in his Book *Titulo Purchase, fol. 86.* saith, That if a new Island rise up in the Sea, *datur primo occupanti*, and agreeth fully with *Justinian* therein; but saith he, if it be taken or divorced from the Continent, then it continueth to the former Owner; but clearly our Law of *England* doth not agree with either of those Authours in the point of ownership. For, if, as I have formerly delivered it, the Sea in property, possession and profit, *tam in aqua quam in solo*, belongs to the King
45 in the right of His Crown of *England*, as I take the Law clearly to be, then it followeth as a consequent, That the Ground which was the King's when it was covered with waters, is His also when the waters have left it; For our Law admits not any thing, either real or personal to go *primo occupanti;* but when an Owner cannot be found, the Common Law gives it *Domino Regi*, as Waifs, Strays, Wreck of the Sea, Treasure found, Escheated-lands, and such like; so that my opinion is conceived in this, that in point of ownership and property, the said new Island is the King's.

But yet I am likewise of opinion, That a new Island risen from the bottom of the Sea, although it be within the Realm, yet it is neither within County, Parish nor Town of this Realm till the King by his Edict or Proclamation have so declared it.

* * *

[47] Now occasion and time gives me fit opportunity to treat of Grounds which be newly gained from the Seas. If, as I have formerly declared, the Grounds be the King's when they be covered with Waters, it must needs be held an infallible ground, that they be also the King's when the Waters have left them dry; and when the Waters had their

being on the same, the whole Profit there arising did appertain to the King;

53 *My Tenets therefore be these:*

First, that the Subject may have the grounds of the Sea to the low-water mark, and that no Custome can extend the ownership of a Subject farther.

That a Subject cannot have the grounds to the low-water mark, but by custome and prescription, and I take it that it is very disputable whether grounds before they be relinquished by the Sea, may be gained by Charter and grant from the Crown; I suppose they may.

That the words *incrementum & decrementum maris* are fully described by the said Record of 43 *E. 3.* of the *Abbat* of *Ramsey:* that is, That if the decrease of the Sea be by little and unperceiveable means, and grown onely in long tract of time, whereby some addition is made to the Frontagers grounds, these by these words may appertain to the Subject; and herein the said words have no other operation, but Lands left to the shore by great quantities, and by a sudden occasion and perceiveable means, accrew wholly to the King.

54 That the increase to the said County Palatine, for the causes aforesaid, doth appertain to the Prince as Earl of *Chester.*

Maine *et al.* **Ex. No. 683.**

Crump, Helen J., *Colonial Admiralty Jurisdiction in the Seventeenth Century*, **pp. 24-35, 58-59 (1931).**

* * *

24 . . . in the seventeenth century vice-admiralty courts are mentioned in connection with the colonies. Sir Richard Whitbourne refers to one in Newfoundland in 1615; Gorges speaks of a vice-admiral on the North American coast
25 in 1622, and men like Captain John Smith, Argall and Captain Mason are spoken of as admirals. The explanation of this contradiction is to be found chiefly in the history of that group of men of whom Sir Ferdinando Gorges was one of the most important.

The expansion of England was largely due to the efforts of this group which was composed of men drawn from the landed classes, of merchants and of sea-captains who had gained experience in the expeditions of Elizabeth's reign. Either as individuals or as members of a company these men had received charters granting them land and sea within certain limits, the power to organise a government and exercise jurisdiction within these limits, and the right to control the trade and fisheries of the planation. It was the period of the great struggle between the Stuart kings and the United Provinces over the North Sea fisheries, and everyone was familiar with the attempts of the British government to compel the Dutch to buy licences to fish for herring in the North Sea; they knew of the expedition under the command of Captain John Mason to collect the white penny from the fishermen of the west coast of Scotland; they were acquainted with the arguments of Selden, who in *Mare Clausum*, argued that the sovereignty of the British king extended from the shores of the British Isles uninterruptedly to the coasts ruled by other sovereigns. Though Selden did not discuss the question of British sovereignty over the North Atlantic, by making grants of these waters the crown tacitly assumed sovereignty there. The colonial patentees then received grants of jurisdiction and territory which had to be turned into a source of

profit. In an age when fisheries were a favourite speculation and the North Atlantic was already frequented by ships of several nations, considerable interest was taken in the grants of sole fishing rights and jurisdiction by sea as well as by land.

Out of these grants grew the attempts to establish vice-admiralty courts in the colonies, for a court which administered sea-law was most capable of enforcing fishing rights and of protecting a trade monopoly. It was natural that those who were interested in colonial projects should desire to enforce their rights by establishing such courts, for in all
26 probability they had personal knowledge of the work of the vice-admirals of the coast. Many of the vice-admirals were drawn from the nobility and gentry, while the merchants and sailors had professional experience of the usefulness of admiralty courts. It may even be suggested that a few of these men had special experience on these points. Sir Ferdinando Gorges, for instance, must have worked with the vice-admirals of South Devon and Cornwall, and may himself have exercised vice-admiralty powers. He had been interested in the colonisation of North America ever since 1605, when Waymouth gave him two Red Indians, and was the moving spirit in the renaissance of the North Virginia Company as the Company of New England, helping to obtain the charter of 1619, which contained a grant of admiralty jurisdiction. For some years Gorges was commander of Plymouth, where he must have come into contact with the officers of the admiralty court, for he had a considerable knowledge of the damage done to English merchant and fishing vessels by pirates, and in 1611 himself forwarded to Salisbury the report of examinations of merchants, who had been set on by pirates. This certainly looks as if he had exercised vice-admiralty powers as commander of Plymouth. In 1617,

Gorges was very active in trying to get the Western Ports to join with London in raising a fund to equip a fleet to sail against the pirates, but the Western Ports hung back, and their reluctance sprang in part from their dislike of Gorges. John Mason also had some knowledge of maritime administration; he had worked for some years in a commercial house in London and had been sent in 1610 in command of a small expedition to the Hebrides, where James VI was trying to regulate the fisheries. In 1615 he was appointed to succeed Guy as governor of Newfoundland. As a merchant, as a commander of the expedition of 1610, and as governor of Newfoundland, the centre of the North Atlantic fisheries, Mason must have needed and acquired a working knowledge of admiralty law and procedure. Two others of the councillors of the reconstructed company of New England were acting as vice-admirals
27 at this time, the Earl of Warwick who had been made vice-admiral of Essex in January 1619, and the Earl of Pembroke, who was appointed to South Wales a few months later. It is therefore not surprising to find that such men were engaged in trying to set up vice-admiralty courts in their plantations with a view to enforcing their monopolies over trade and fishing.

* * *

29 The British fisheries were, . . ., a matter of national importance, and a subject of national interest. The struggle with the Dutch over the North Sea fisheries, the numerous schemes that were in the air for extending the fisheries, and the importance of the fishing population to the royal navy, all combined to arouse great interest in anything which touched the fisheries, and the western ports were able to carry their attack further.

The cause of the renewed attack in 1621 was the revival of the North Virginia Company as the Company of New England. This was largely due to the efforts of Sir Ferdinando Gorges, who succeeded in obtaining a charter granting exclusive fishing rights on the coast of North America between the 40th and 48th degrees of latitude and admiralty jurisdiction to enforce these rights. It was the practice of the day to appoint an admiral to look after such matters. The duties of an admiral of a colony were neither those of a fishing nor of a naval admiral. He was responsible for the company's ships which conducted the trade between England and the plantation; it was his duty to
30 prevent interlopers in trade or fishing; he had to protect the colony from pirates; and in some cases he was responsible for collecting licences from the fishermen frequenting the private waters under his control. Here lay the trouble. Patents often gave a monopoly of fishing in territorial waters, sometimes, as in the case of the New England Company, as far out as a hundred miles from shore. The fishermen who had frequented the coasts of North America long before the days of colonisation resented this, and the business men at their back were ready to fight. In 1548-9, as a result of an earlier struggle between fishermen and vice-admirals, a statute had been passed forbidding admiralty officials to take dues in money or fish from those fishing in Iceland, Newfoundland, or Ireland under penalty of heavy fine. This gave a decided advantage to the western ports in the renewed struggle with the colonial promoters.

Alarmed by the grant of the charter to the Company of New England, the western ports used their influence to get a bill for free fishing brought before the House of Commons. This is not the place to recount the details of the struggle over the fishing rights of the New England Company,

but it is impossible to avoid telling some part of the story, for Mr. Neale who spoke for the bill, complained bitterly of Whitbourne's court, while Secretary Calvert who was himself a patentee in Newfoundland put the settler's point of view. Neale objected to the vice-admiralty court on practical as well as legal grounds. He maintained of course that it was contrary to the statute of 1548-9 to collect any dues from fishermen, but he further said that it was impossible for captains to spare any time out of the short fishing season of seven weeks to attend a vice-admiralty court. Since they were fined for non-attendance, Neale declared that the real purpose of Whitbourne's court was to extort money from the fishermen. Calvert did not mention the vice-admiralty court, but he spoke of the habits of the fishermen of burning the woods and unloading ballast into the havens, against which Whitbourne had proceeded. Before the bill could reach its final stages James I prorogued parliament.

31 During the prorogation the Council of New England was very active in trying to enforce its rights. The records of the company are fragmentary; they only exist for the periods 31 May, 1622-29 June, 1623, and 4 November, 1632-22 March, 1637. The glimpses of the activity of the group of men who ran the company are tantalizing, but luckily they throw a good deal of light on the interval between the struggles in Parliament of 1621 and 1625-26. On 5 July, 1622, the Council of New England was discussing a proposal to "sollicite ye Lords for procureing from his Majestie a proclamation concerning ye fishermen of ye Westerne parts. Likewise to procure some course for punishing their contempt of authority. And that Mr. Attorney bee moved herein." A week later the same subject came up for discussion. The fishing season was of course in full swing in July and it was too late to do anything that year, but in the autumn the Council was busy

making plans for the regulation of the ships that would set sail at the end of the winter. On 28 October, 1622, it was decided to levy a toll of five fishes out of every hundred from English ships, and to prevent foreigners from making dry fish. On 2 November there is the first hint of the steps that the council meant to take to enforce their rules; "it is ordered that a Commission bee engrossed for Capt. Francis West and afterwards sealed." What this commission was becomes clear from the minutes for the meeting of 8 November. Captain West is to sail in command of the "Plantation" to New England "to be Admiral for that coast during the voyage." Captain Thomas Squibb was appointed to assist him, and Sir Ferdinando Gorges was to draw up his instructions. The Council on 11 November drew up orders for regulating commerce which the admiral was to have fixed to the mainmast of all ships. The Council was careful to explain their actions; they did not mean to hinder anyone from going to fish in their waters provided they obtained a proper licence from the treasurer at Exeter.

32 But West was only to have admiralty power on the coast of New England, and there was work to be done in England before the fleet set sail. Gorges always considered that an admiral was an indispensable officer. He makes this clear in both the *Discovery and Plantations of New England* and in the *Brief Narration*. The proposal, then, which was made in January, 1622-3, that Sir Samuel Argall should be admiral of New England is only the natural outcome of Gorge's ideas on administration. The idea was developed at a following meeting, when the Council decided to consider "fitt persons to bee elected to attend the said Councell and Service upon all occasions vizt. An Admiral, a Vice Treasurer, a secretary of Councell, a Solicitor of ye publike businesse, a Beadle for summoning the

Councell to their meetings." The appointment angered Captain John Smith, who always maintained that he had been appointed admiral of New England for life, though owing to various misfortunes he had never acted as such. Whether Argall ever did anything it is impossible to say, for the minutes of the Council end soon after his appointment, and the *Calendar of State Papers Colonial* reveals no trace of any activity on his part.

32 West, was however, active. The Council considered the expenses of the expedition in January, 1622-3, and the possibility of building a pinnace in New England, obviously for use in collecting the fishing licenses in waters where a larger ship could not be used. Towards the end of June, West arrived in New England "to be Admirall of all the country, to restrain interlopers, and such as came either to fish or trade upon the coast without license from them," *i.e.*, the Council of New England. Apparently the Council had decided in the Spring that West's expedition would not be sufficient, for Hubbard continues "In the end of August following arrived there Captain Robert Gorges, son of Sir Ferdinando, sent from the Council, as Lieutenant-
33 General over all New England, for preventing and reforming all such evils and abuses as had been complained of to be committed by the fishermen and others, who not only without order and leave frequented these coasts, but, when they were there, brought a reproach upon the nation by their lewdness and wickedness among the savages. . . ."

* * *

58 The personnel of the provincial court generally consisted of a few councillors, presided over by the governor or his deputy; among these councillors was often the admiral of

the colony. Before discussing the nature of and procedure used in such admiralty cases as arose in Virginia and Maryland, it is well to spend a little time in investigating the office and duties of a colonial admiral. Something on this subject has already been said but more may be added here. In North Atlantic waters the admiral was chiefly concerned with the attempt to control the fisheries. Sir Ferdinando Gorges and his colleagues conceived of an admiral mainly as an executive officer whose business was to see that the vessels which frequented the Banks or the coasts of Maine had proper licences from the Company of New England. In Virginia and Maryland fishing rights were not questioned, because there were no great fisheries to tempt adventurers from Europe. Yet fisheries were partly responsible for the appointment of an admiral of Virginia. . . .

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Maine *et al.* Ex. No. 690

Fenn, Thomas Percy, Jr., *The Origin of The Right of Fishery in Territorial Waters,* pp. 70-80, 93-94, 98-118, 122-26, 130-49, 155-57, 170-75, 196, 219-23 (1926).

* * *

70 The Regalia consist of the perquisites and prerogatives of the king or emperor. . . . :

* * *

It will be observed that such things as *portus* and *flumina navigabilia,* which were *res publicae* in the technical sense under Roman law, and were therefore owned by the *populi Romani* considered as a whole, are now vested in or appropriated by the king or emperor, or, at most, they reside in the office. It is to be presumed that the Regalia

carry with them the rights and powers necessary to give them effect. This is certainly true with respect to the *redditus piscationum*, for the feudal lawyers number the *ius piscandi* among the Regalia, even where they most carefully restrict its use.

* * *

73 In regard to the Regalia, Brussius writes that in his country, Scotland, the *redditus piscationum* is included. Salmon fisheries are embraced within the meaning of the term. He is in agreement with Craig in adding that these may not be granted save by a special *concessio* expressly given. Furthermore, salmon themselves are the property of the king, wherever they may be found, even in rivers.

The emphasis which feudal law places upon property rights is brought out with precision in the work of M. Hervé, a French lawyer and expert on feudal law. Every one knows, he writes, that ports and rivers are things common to all the world, and that every one has the right of fishing in them. But it is also true that one can acquire an exclusive right of fishing in them in a certain place, so that one may forbid another to fish before one's house. This private right can be acquired equally in public rivers and in the sea. M. Hervé would recognize, of course, that this provision is to be found in the classical Roman law, and represents the result of the mixture of the Roman with the feudal systems of law.

This right of fishing is a property right and not a personal one. It reposes in the property. Under the Roman law, if every one had the right to fish in public rivers, it was because every

74 one owned those rivers. Under a monarchy, where the sovereignty resides in a single person, such common rights are also concentrated in him. He alone may exercise them, in the name of all. It follows that the right of fishery is not a right essentially feudal. It is not as *Seigneur de fief* that the king possesses it; he would still have the right were he neither lord nor suzerain. As a matter of fact and of usage, this right is generally exercised by the lords of fiefs, and a feudal character is given it. Yet it remains a right of property. All rights inhering in public property reside in the king.

* * *

77 The writer is following the doctrine of Baldus, a jurisconsult of the fourteenth century who is cited with great frequency by his successors. Although most of his work lay in other fields, Baldus wrote a commentary on the feudal law. He defines the Regalia as the

jura praecipua Regis, vel Imperii, seu fisci Romanorum, vel cuiuscunque Regis, qui in regno suo est monarcha, licet Imperatore minor ambitu circuli.

The Prince is lord of his territory and of the sea subject to him. The portion of the sea subject to him is that which is adjacent to the coasts of his territory.

Porro territorium non est aliud quam terrae spatium minutum & armatum iurisdictione. In mari autem non dicitur territorium . . . sed dicitur districtus, id est, aquae spacium, seu latitudo similiter munita iruisdictione & imperio.

Baldus injects the theory of the adjacent sea into feudal law. Jurisdiction is no longer to be exercised anywhere over the sea; it is to be exercised in the sea adjacent to the territory of the Prince exercising it. This portion of

the sea is not called territory. There is no claim to *dominium* or *proprietas* in it, as yet. It is a district in which the Prince has a right of jurisdiction, a district attached for certain governmental purposes to the nearest territory. The source of this jurisdiction is to be found in the Prince – the King or Emperor – himself. It is a royal or imperial prerogative. It is, in a word, included in the Regalia. Presently it was to be an attribute of the office and not of the man. This theory arose in the later days of feudalism, for Baldus died in 1400. One hundred years later, Afflictis recorded the existence of an officer new to the law, the admiral, who was appointed by the Prince, and who ranked as the third of the principal officers of the realm.

It will have been noted that there were important rights included in the Regalia which are not recorded in the "Libri Feudorum." According to Amicangelo, another Italian feudalist, the Regalia owe their origin to the *ius gentium*, because the election of the king is by the *ius gentium*. Be that as it may, they undoubtedly had their foundation in customary law.

A distinction exists between fisheries and fishing, between the *reditus piscationum* and the *ius piscandi*. The power to grant either or both in the sea or in the public rivers was lodged in the Prince. He might delegate the latter, that is, the power and authority to grant the *ius piscandi*. He could grant a fishery to a lord from which the public could not be excluded provided that they paid a certain fee to the lord. He could grant a right of fishing to a private person in a fishery which he had granted to another. He could grant to a private person or to a corporation the right to the exclusive use of a public fishery once a week, say, from sun up to sun down on every

Friday in the year. Against the Prince there was one check, prescription from time immemorial. Against other private individuals, there was this check, and that of a special privilege granted by the Prince, or a special concession from him. The state of the law is too vague to be capable of precise definition. But this may be said: the *piscatio* was probably a location, a place where fish were known to gather. The *ius piscandi* seems to be the feudal equivalent for the modern right of fishery. The Prince, or the Crown, has the right of fishery in all public waters. So far as regards the public rivers, this right is a property right. With regard to the sea, the right is limited to the coastal waters for an unspecified distance off shore. The source of the right is not clear. In view of the fact that the sea had always been held to be open freely to all, it is probable that the right is a right to fish in certain parts of the sea, in certain *piscationes* off shore. On the high seas the Prince or the Crown had no rights of fishery, save those which every man had.

78 Whether the Prince's property right in the public rivers was based upon ownership of the underlying soil, or upon ownership of the flowing water, or upon ownership of both, is a problem left undefined. It is probable, having regard to the nature of the feudal system, that the Prince owned the soil. His prerogative of the right of fishery in tidal waters was not based upon a claim to ownership either of the soil or of the sea. At the most, he owned the fisheries, the places where the fish were caught. From ancient times the state had owned public fisheries, just as it – or the people – had owned the public rivers. The transference and concentration of power in the hands of the monarch which created the theory attributing to him the ownership of the rivers, as well as of the territory which composed his dominions, probably operated in a like

manner to ascribe to him ownership of the sea fisheries. The theory of territorial waters which began to take shape at the close of the fourteenth century was not a theory of
79 ownership of those waters, though it was both logical and inevitable as to reason and fact that it should issue in such a theory. The theory to which Baldus gave expression was one of the exclusive jurisdiction of the king or Emperor over the seas adjacent to his dominions. This jurisdiction, furthermore, was not to be used to force from other states a recognition of sovereignty – for there was no sovereignty – nor for the purpose of providing occasions for the gratification of royal or of national pride. It was to be used to safeguard the sea for the purposes of commerce, of navigation, and of industry. And, which is important, it was to prevent any other monarch or state from sending armed forces into those waters for that purpose. Beyond these generalizations it seems hardly safe to go. While there is a broad agreement of principles, the application of the law was bound to vary with the custom of the community. It was bound to vary, also, with the shifting relations of the king or Emperor to his great tenants in chief. A strong ruler could insist upon his prerogatives; a weak ruler could not afford to do so.

The influence of Roman legal conceptions upon feudal law is easily discernible, especially in the writings of those jurists who champion the community of use of the sea.
80 In the Assizes of Jerusalem, which is, perhaps, nearly pure feudal law, there is no mention of sea fisheries. No jurist could ignore the Roman law if he desired to write concerning the relation of the king to the right of fishing in the sea. The rights implicit in the possession of the Regalia had to be either restricted or expanded; the mere statement of these rights made a definition of the scope of their exercise almost

inevitable. Both feudal lawyers and jurisconsults alike were faced with this problem. Their solutions of it will be considered in the following chapter, and the doctrines of which they laid the foundations will be traced to their fruition in the great work of Hugo Grotius and the classic reply of his opponent, John Selden.

* * *

93 Fleta yields nothing except the usual provision in regard to the royal monopoly of sturgeon, and a provision that the customary division of whales caught on shore shall be followed – the head to the King, *et Regina caudam.*[5]

* * *

94 *Quo nunc ergo iure nostri Principles quod Natura voluit esse liberum et commune, servum propriumque faciunt? Quo iure Venetiis mare Adriaticum, Genuensibus Ligusticum servit?*

Quo iure? Balduinus had put the critical question. For Balduinus died in 1573. As will be seen below, the teachers of the contrary doctrine gained considerable strength

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5 *Fleta, seu Commentarius Juris Anglicani,* bound with Joan. Seldenus, *Ad Fletam, Dissertatio Historica,* 2d. ed., London, 1685. P. 61, cap. 45: "De Sturgione aliter observetur, quod Rex illum integrum habebit propter privilegium regale. Cap. 46: De Balaena vero sufficit, si Rex habeat caput, et Regina caudam."

This is the last of an English theory concerning the freedom of the seas, during the period under discussion. Plowden did not, indeed, advocate any right of property in the sea; but he entertained a pronounced theory as to the scope of the King's jurisdiction.
94 He will be noted below. Digges, Welwood, Boroughs and the rest went far beyond him and made it quite clear to everyone that the British seas were, at least so far as they were concerned, as British as the realm of England could possibly be.

during the last quarter of the sixteenth century. It has already been observed that the end of the century was a time when the love of the past was giving place to a keen interest in the present. This interest was as marked in the world of theory as it was in the world of fact. The authority of use and custom gained respect proportionally as the authority of the classic Roman law diminished in the estimation of the period. To-day, said a late writer, kings and princes are wont to claim under the name of territory the *dominium* of the sea, the ownership of the *sea!*

* * *

98 Bartolus of Saxoferrato, or Sassoferrato, 1314-57, was an Italian jurist and teacher of law at Pisa and Perugia, and a counsellor of Charles IV. His fame excels that of any other jurist of the middle age. . . . In Spain and
99 Portugal his opinions were for a long time given binding force by law. Not only is he reputed to have held first place in the schools, during his lifetime, even, but it is said that in the courts his authority was so great that the judges did not dare to contradict him. Apparently, to quote Bartolus was to silence the opposing view.

This unique influence was due not merely to Bartolus's preeminent ability. He lived at the close of one period and at the beginning of another. In the thought of the middle age there is a borderland where theology, politics and law meet. In the controversies between Church and State, and in political theory generally, this relationship is conspicuous. For example, it was possible to denounce heresy as treason. The peculiar product of the fusion of these three systems had a profound influence in the doctrines of the relation of the Prince to his people, of the

relation of the Prince to the Pope, and of his relation to God. It dominated political theory during the Reformation. It was influential in determining the structure of the modern state. A cursory reading of Grotius will show that it is the foundation of international law. Almost any discussion of the *ius naturale* will show an interplay between these three systems of thought. The *ius gentium* is obviously dependent on them. Bartolus was the great, if not the only channel through which this type of thought
100 flowed to the modern world. . . . .

* * *

". . . Such a mind was eminently fitted to sum up in itself the long ages of legal development, and to suggest the lines of future advance.' If Bartolus was this kind of a man – and the weight of authority is with Figgis – his attitude upon the legal status of the sea is of the first
101 importance. It is perhaps not an exaggeration to say that no pronouncement more important had been given up to this time since the days of Justinian.

B. His Doctrine

Mare sub cuius territorio comprehenditur.

In a concise and forcible manner, Bartolus injects this doctrine formally into jurisprudence. It is given more fully in the *Gemma,* a collection of his sayings, as follows:

Mare dicitur illius Domini, sub cuius territorio comprehenditur.

In commenting upon the practice of certain states of driving *homines males* off the sea, Bartolus justifies it by an argument from analogy. As it is fitting for the *praeses*

to drive off or to punish evil doers on land, so it is likewise fitting for him to do so at sea. The word, *congruo*, probably conveys more than a mere sense of appropriateness. The *praeses* is fit to undertake this work. It is suitable to and consistent with his office. It is so eminently proper that he who suppresses crime on land should do so in the waters adjacent to his territory that it may be said that he has the right to do so. But if he has a good right, then to do so is good law, for the simple reason that it is *ius*. For *ius*, of course, carries the meaning of both right and law. Some such train of thought as this was probably in the mind of Bartolus; for this seems to be one of those "borderland" questions on which the mediaeval mind was able to focus at once theology, politics, and law. His reasoning is a compound of all three.

A city-state owns the islands located not far from its coasts and may destroy pirate strongholds on them: . . . .

* * *

102 The question of a state's property rights in the islands off its coasts arises in Bartolus's mind in connection with the suppression of piracy, just as does the question of maritime jurisdiction over the waters adjacent to its coasts. His train of thought is not dissimiliar. An island is regarded as part of the mainland, as it were, sticking to it. It is a fragment of the mainland. It goes with the territory nearest to it. The state which has property rights in that territory has also property rights in the island. The state extends its jursidction out to sea; it extends its power to hold property out to sea. The reasoning in both cases is practical, if not pragmatic.

In neither case is Bartolus arguing for a property right in the sea itself. In the first case, the state's jurisdiction over the sea adjacent to its coasts has its source in what may be called its police power. This power is already in

being, by virtue of its existence, be it vested in an emperor, king, or people. The power of a state to enforce the law within its own territory is not doubted. What law it is that is enforced is another question. Bartolus arrives at his doctrine simply by not restricting this power to the land. He is unable to see any reason why a state should not have exclusive rights of jurisdiction within its territorial waters. He has not postulated a new power or a new source of power. It is to the interest of a state to protect its coasts, and to make the neighboring sea safe for navigation. It would be more difficult for him to deny such a right to the state than it is for him to advocate it. There is no right of sovereignty over these waters; there is merely a right of jurisdiction over them.

In the second case, that of the islands, there is a property right involved. But it is a property right in the islands, not in the sea. He is aware of the doctrine that because
103 the sea is common to all, things in the sea are common to all and therefore no property right (of the sort he is advocating) is legally possible. But he waives this doctrine aside without troubling to refute it. The origin of this property right seems to be in the nature of the island's relations to the mainland. It belongs to it. The right existed, and the ownership of the island was a fact, before Pisa was troubled by the band of pirates which established a base there. The question concerning which the Pisans were in doubt was whether or not the pirates were on alien territory. It is interesting to note that as he writes his doctrine, Bartolus cites one of his own opinions in support of it.

The query arises, How near must an island be in order to come within the territory of the neighboring state? Bartolus gives an answer to this question in his tract on rivers.

* * *

Bartolus puts a double question: whether he who has jurisdiction in territory adjoining the sea has jurisdiction in the sea itself; *and* (if so), to what distance seaward. The first part of the question is answered in the affirmative. Then, instead of answering the other half, Bartolus passes to his discussion of islands. The reasoning here differs from that above. Since a "province" has jurisdic-
104 tion over the sea, it has jurisdiction over the islands in the said sea. He goes on from this point to state almost in parenthesis that those islands are said to belong to a "province" which are but a moderate distance from it. The rest of his discussion is taken up with a definition of the phrase, "moderate distance," and with a consideration of those islands which lie outside the distance specified, that is, those which are more than one hundred miles away. He does not return to the unanswered half of his question.

This passage from the *De Fluminibus* is frequently cited by later jurists. Caepolla, who refers to it with more exactness and with a fuller treatment than does any other writer, leaves the question as Bartolus leaves it. The general impression seems to be, however, that Bartolus is laying down a hundred mile limit to the jurisdiction of a state over the adjacent sea. It is probably correct to presume that this was his intention. Indeed, whether it was, or not, it follows from his reasoning. A state has jurisdiction over the sea adjacent to its territory. It has jurisdiction over islands in the said sea. It has jurisdiction over islands which are not distant farther than one hundred miles from its coast. Then the implication is plain, and the conclusion is unavoidable, that the state has jurisdiction over the sea to a distance of one hundred miles from its coast. The conclusion is inevitable because the state's jurisdiction

over the islands in the adjacent sea is made to depend upon the jurisdiction of the state over that part of the sea, and not upon any property right which the state may possess in them. Suppose an island to be one hundred and ten miles distant from land, and twenty-five miles from another island which is eighty-five miles from land. Then the first island belongs to the state which owns the second island. But would the jurisdiction of the state extend over the twenty-five miles of water intervening between the two islands? Or only over fifteen of those miles? Such questions as these are left for a later day to answer.

105 In may be observed that the doctrine of Bartolus is at once progressive and restrictive. From the point of view of those who admitted no maritime jurisdiction of an exclusive nature, he is revolutionary rather than progressive, for he is teaching the subversive doctrine that a state has sole rights of jurisdiction over a thing on which and in which all men have equal rights. But from the point of view of Venice and Genoa, and particularly, the former, he is rather more reactionary than progressive. His doctrine is in effect a limitation upon the sweeping claims of the Venetians to the gulf or sea of the Adriatic – claims which, moreover, they were making good by reason of their naval supremacy in that sea, and claims which they did not cease to assert until the fall of Venice in the eighteenth century. As has been noted, the Venetians claimed not only a right of exclusive jurisdiction in the Adriatic; they claimed the ownership of the sea. A just appreciation of the doctrine of Bartolus will not overlook this two-fold character which it possesses.

* * *

115 Caepolla adopts Bartolus's hundred-mile limit to the distance to which the Prince may exercise his jurisdiction over

the sea. This means that he holds the doctrine of the adjacent sea. The sea is ordinarily distinguished by the territory adjacent
116 to it. Or, put in another way, the adjacent sea is comprehended in the territory of a state as a district of that state. This, it will be recalled, is in agreement with the doctrine of Baldus. Caepolla observes that it is the most favored opinion. The basis of this jurisdiction is other than that of those cases where a state has acquired it by prescription.

* * *

123 . . . [T]here is another theory according to which the sea comes within the meaning of the word, territory. In support of this theory is the notable jurist, Albericus Gentilis. His doctrine is to be found in the eighth chapter of the first book of his *Hispanicae Advocationis*, which bears the significant title, "De marino territorio tuendo."

Gentilis, 1550-1608, belongs to the modern Italian school of natural law. He is famous, of course, for his work in the field of international law. Like Grotius, he wanted to check the barbaric wars into which the countries of Europe were so frequently drawn. His test for the lawfulness of any war was in the principle of natural justice, which had its basis in the nature of mankind. But, unlike Grotius, he sought to derive his laws from the observance and appraisement of international practice. After 1537 he was professor *"regius juris civilis"* at Oxford.

He begins in Chapter VIII by referring to a controversy between Spain and the Dutch. The latter had made a strong protest because a Dutch vessel had been stopped on the high seas by a Spanish ship and had been forced to surrender certain booty which, it appears, had been taken from Spanish subjects. Gentilis takes an unfavorable view

of their representations, and states that the word, territory, is applied both to land and sea.

At ego, quod olim scripsi in libris bellicis, territorium et de terris dici, et de aquis.

He cites the "doctors" in general as saying that the Venetians and the Genoese, and others having a port or harbor, are said to have jurisdiction and *imperium* in the whole sea near them to a distance of one hundred miles, or even
124 more, if there are no other "provinces" near. And he adduces Bartolus as support for his statement. Strictly speaking, of course, Bartolus did not lay down an indefinite limit under the condition mentioned by Gentilis. He said that if an island which was more than one hundred miles distant from a state was near an island which was within that distance and which belonged to the state, then it also belonged to the state.

* * *

124 Let the Dutch, he proceeds, and every one use the sea – but without violating foreign jurisdiction. Let them remember that there are things heretofore undefined which are defined to-day; and that the distinction in the *ius gentium* between dominions and jurisdictions must be most carefully observed.

Gentilis credits Baldus with his theory of *mare adiacens pars dilionis*, and with justice, for the adjacent sea, in the thought of the latter, was a *districtum* appertaining to the land, in which the *ius civile* is operative.

In addition to this doctrine and the Bartolist hundred-mile limit, there is the phrase, *mare portio terrae*, and the application of the idea contained in the word *territorium* to the sea. After Gentilis it is literally correct to speak of

territorial waters in international law. What Gentilis has to say is given additional significance because he is observing international practice and appraising it. . . .

Caspar Klock gives expression to this theory of territorial waters in the field of Roman jurisprudence, though perhaps in not quite so definite a fashion, or, at least, not so pointedly, as does Gentilis. . . . .

The sea to the distance of one hundred miles belongs to the nearest shore.

* * *

5. DOMINIUM MARIS

When the theory of *mare adiacens* hardened into a theory of exclusive jurisdiction, it made that of *dominium* inevitable. The tendency of the theory of the adjacent sea to develop a doctrine of state (or royal) ownership is apparent. The theory of territorial waters is latent, if not implicit, in the theory of littoral waters. It (the former theory) demands an extension of what to-day would be called the municipal law of the state concerned over the adjacent sea, and it rests upon an inclusion in the word, *territorium*, of *mare* as well as *terra*, or, precisely, of *mare adiacens* with *terra*. It will be perceived at once that the union of the adjacent sea with the land adjoining, although made primarily to facilitate the justification of a theory of jurisdiction over the former, is favorable to the growth of the notion that the state exercising this jurisdiction has a certain property right in the waters in question. A pirate, for example, caught *flagrante delicto* in the sea adjacent to the territory of State A by an officer of State A is tried in the courts of State A and by the law of State A. Furthermore, it is unlikely that an officer of State B

would venture to capture the pirate off the coast of State A at the time in which the theory of the adjacent sea had become a commonplace. If he did so under pressure of immediate necessity, he would be more than likely to surrender his man to the officers of State A. The selfconscious despots of the Renaissance would hardly suffer their coastal waters to be invaded by the naval forces of another monarch for the purpose of using his arms there, on any pretext. The growth of the modern states forced the old theory of cooperation in the suppression of piracy to be abandoned. With this relationship, then, which was at once both legal and political, between a state and the sea adjacent to its shores, gradually becoming generally accepted, the rights of property recognized on land could, with the appropriate modifications and qualifications, be extended to the coastal sea in much the same way in which the criminal law of the state had been extended there. Finally, the early belief that sovereignty is inseparable from ownership of the soil, made it a simple matter to predicate ownership of the sea. In the sovereign (monarch or republic) only lay the right to exercise jurisdiction. The sovereign was the ultimate owner of all the land in the kingdom or republic. This, everyone knew. But the sovereign exercised jurisdiction over the sea. And when this theory began to receive careful attention from the jurists, he was exercising exclusive jurisdiction. It followed, therefore, that the sovereign must have a right of ownership in the sea, just as he had a right of ownership over his lands.

Now, the distance to which his rights in the sea extended was an entirely different question. The controversy over *mare liberum* versus *mare clausum*, which is about to receive attention, was serious primarily because the advocates of *mare clausum* placed an extravagant interpretation upon

the meaning of the term, adjacent sea. Grotius himself admitted the rights of a state to the ownership of its gulfs and bays. What agitated him was the claim of Spain and Portugal to divide the ocean between them. Selden was reasoning on sound principles when he championed the theory of territorial waters. The menace in his argument was his definition of them.

Aside from the question as to the extent of the territorial waters of a state, there was the further problem in regard to the restraints, if any, to which the sovereign's right of jurisdiction was subject. Undoubtedly this question was on a parity with the other. But it was so because of the material interests at stake – in the one case (omitting Venice and the Adriatic), the trade with the "East Indies"; in the other, the exploitation of the abundant herring fisheries off the coast of the British Isles. In the former case, thousands of miles were involved; in the latter case, some fourteen miles. But the wealth within the two districts was very great. Those on the outside wanted such restraints on the jurisdiction of the sovereign as would give them free access to it. Those on the inside wanted to admit foreigners, if at all, only on their own terms, and consequently admitted only such restraints as would not hinder them in realizing this desire.

It may be granted that, actually, and in practice, the potential wealth involved not only colored the views of the lawyers on the question as to the extent to which a sovereign may exercise his right of jurisdiction over his
132 territorial waters, but also that it influenced profoundly their definition of the area comprised within the meaning of that phrase – that is, the phrase, "territorial waters," or the other, "adjacent sea." But, it is submitted, that in the development of the theory of state

ownership of the sea, the question of the extent of the territorial waters precedes in point of logic – as it certainly does in point of time – the theory of the powers which the local sovereign possesses in those waters. The theory of the exclusive jurisdiction of the local sovereign in the adjacent sea made possible the theory of ownership of that sea. The next step was, not to define his jurisdiction, but to define the amount or area of sea covered by it.

The prizes at stake, however, befogged the issue. The Dutch appeared as antagonists both to Portugal and England. Against Portugal they argued for freedom of navigation and of trade. Especially they wanted freedom of trade, because a free right of navigation only would serve them little. The desire for free navigation was produced by the method which the Portuguese took to prevent freedom of trade. Had protective tariffs been in effect in the East Indies, the Dutch argument would have been quite different. What the Dutch were after was, really, not the open sea, but the open door. Against England, the Dutch argued for freedom of fishery. This was in essence an argument to take freely the products of that sea the use of which is common to all, and the proprietorship of which belongs to none. Since the herring frequented the coastal waters of the British Isles, it was necessary to restrict those waters to gulfs, bays, and inlets of the sea, with perhaps a strip of open sea off shore. Or, if a greater area was admitted, then to restrict the jurisdiction of the king in a manner calculated to make it impossible for him to tax or to bar foreign fishermen. Grotius, while attacking the Portuguese, had not overlooked the fishing industry. His doctrines on the free sea were sweeping enough to provoke a number of refutations from the English. It is interesting to note that his work passed almost unnoticed on the Conti-

133 nent for years. Of course the Spanish and Portuguese stood alone in their position. The English claims were a different matter. The principle could be admitted with advantage by other states, provided that there were placed reasonable bounds to the sea involved. And so it was that the rights of a king in his own waters were entangled with a controversy over the extent of those waters. And the former element has come down in history as the dominant element, and the controversy is called one over the freedom of the seas, following the favorite titles of the period – *mare liberum,* and *mare clausum.* This is true in spite of the fact that both sides admitted the freedom of the *high* seas – the vast ocean, as they called it. The question really was, for England and the United Provinces – and they are the important contestants – what was the main sea and what was not. The English claimed rights which could be granted only in strictly territorial waters; they knew it, and claimed an enormous area of sea as being within the realm of England. The Dutch, not taking any notice whatever of the argument from territorial waters, claimed the freedom of the seas for themselves, and opposed the English with the accusation that the high seas were being illegally enclosed, that illegal restraints were being placed upon the use of the sea. The two parties were arguing from different premises at this point, and sensing the common ground of difference without apparently being able to define it, used ambiguous adjectives and indulged in repetition. The argument became one over the rights of a king in waters not his own, when it reappeared in the autumn of 1914. That was the form it took when viewed through Dutch glasses in the seventeenth century.

The *right* of ownership, then, in *territorial* waters, was not the fundamental dispute in the controversy referred to, except in so far as unsound definitions of territorial waters

made it so. The *extent* of ownership over the sea was the kernel of the dispute. What the owner could do with his sea became of crucial importance because of the amount of sea claimed by him, and not because he claimed some part of the sea. That he should claim any part of the sea at all (excepting gulfs, bays, and inlets) scandalized the Dutch and became an issue only because the waters immed-
134 iately off shore were abundantly supplied with herring, and *not* because the claim marked a departure from accepted or familiar legal theory.

After due weight has been given to the distinctive characteristics of this controversy, it remains true that the lawyers who participated in it were the heirs of their past. The doctrine of *mare clausum* was made possible by the development of the theory of the adjacent sea, to which consideration has been given. The doctrine of *mare clausum* is based on that of the ownership of the sea, of *dominium maris,* and is the product of it. The word *dominium* is itself significant. In mediaeval legal Latin it connotes a mixture of the ideas expressed by the words *propietas* and *imperium.* It signifies at once ownership and lordship. It has itself undergone a development from the original meaning of ownership, which has left it ready to hand for the purposes of the moderns who use it.

* * *

148 That is to say, these two questions were settled in principle. The lines were laid out along which international practice was to move. The principles were enunciated to which appeal could be made in the controversies of the future. The question whether *mare adiacens* could be owned as property was settled in the affirmative. That was the question which had to be settled; that was the question without an answer to which nothing else could be settled.

In the development of the original theory of the freedom of the sea into that of territorial waters there is a series of critical points. The first point is the doctrine of Paulus that a private individual may possess *proprium ius* in a definite part of the sea. The second is that doctrine of the Glossators which states that this private right may be acquired by privilege or by long-standing custom – *per privilegium vel per longam consuetudinem.* The third point is the doctrine that the *Princeps* may impose a servitude on the sea. For both these doctrines the authority of Azo is given in the *Corpus Iuris.* By a broad interpretation of the rights of the king or emperor as enumerated in the Regalia, and by a wide application of the laws of prescription to the sea and to maritime fisheries, later jurists broke down the original doctrine forbidding private appropriation of what is common to all. They added important exceptions to this doctrine, or law – for such it became by its incorporation into the Digest – until they interpreted away the meaning which it had once possessed. The fourth point is the enunciation of the theory of *mare adiacens* – of the adjacent sea. For this point Bartolus is responsible. Almost at once it received an accretion from Baldus, with his theory that the sea adjacent to a state is a district of that state over which the state's law is extended. These four points provide all the material necessary to create the theory of territorial waters, of *dominium maris.* Gentilis marked the fifth and last point when he intentionally applied the word *territorium* both to land and water. These are the five links in the chain which connects the classic doctrine of the freedom of the sea with the modern doctrine of territorial waters. Throughout the history of this development the open sea remains in theory free to all. At the beginning this freedom is sanctioned by law; at the end it is

sanctioned by expediency, or even by necessity. But at the beginning, this freedom was thought to be inviolable; at the end it was no longer thought so.

The opening years of the seventeenth century form the final period of the development of the theory of *dominium maris.* After that time further development became merely modifications of existing theory. This period must now be considered in some detail.

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IV. SUMMARY

The evidence produced in the foregoing pages points to the conclusion that the somewhat uncritical praise which has been given occasionally to Grotius's essay on the freedom of the sea is not altoghether warranted. The freedom of the high seas was not disputed by the advocates of a state's ownership of its territorial waters, with the possible exception of Selden. And even he conceded that, in practice, freedom of trade and of navigation should not be violated. His point that there is nothing in the *nature* of the sea to prevent its appropriation is sound. That the sea has not in fact been appropriated by the Powers is due to reasons of an entirely practical character. The only two countries which attempted to put into practice their claims to a monopoly of the western highways of traffic found that their case fell of its own weight. The fiats of the *ius gentium,* of the *ius naturale,* and of the *ius civile* simply had nothing to do with it. The reason why Spain and Portugal failed to make good their claim was this, that it was unworkable. At the other extreme lay the claims to absolute rights in territorial waters. Here, the weight of opinion is overwhelmingly in favor of the thesis that a state has the rights of ownership in the sea adjacent to its coasts. Grotius's position

220 on the matter is ambiguous. He separated gulfs, bays and inlets from the main sea; but he failed to clothe the state with tangible rights in these waters. He failed also to distinguish between that strip of coastal waters which had become known as the adjacent sea, and the main body of the sea. In his later work on the law of war and peace he modified his position somewhat on this latter question, but he failed there also to make any concession which would seem to countenance the existence of property rights in the sea. So far as can be gathered from his cautious statements on the whole subject, he seemed to think that the rights of the state in the waters in question extended only to the maintenance and enforcement of a certain jurisdiction over these waters, and to the protection of navigation and fishing therein. It may be said with some certainty that this is the view of "Mare liberum." When it is said that Selden and his colleagues were quick to see that Grotius had attacked the British claims in "Mare liberum," it should be remembered that it is his position on the adjacent sea which constituted the attack, and not his position on the high seas. For the Continental lawyers, also, who were not parties to the British controversy, the question concerned the adjacent sea only. Outside of Holland, the Grotian position found no support. Legal theory pronounced against the community of ownership, against a common proprietorship, of the littoral sea. The British claims, and, to a less degree, the Scandinavian claims, were extravagant to the point where they encroached upon the high sea. When Grotius denounced such pretensions, he spoke to the mark. But he denounced them for the wrong reason. This question is essentially different from the former one. That is to say, that the question, how far out to sea territorial waters extend, is essentially different from the question, whether there can be territorial waters. Grotius, in denouncing the pretensions referred to,

denounced them on the ground that there could be no territorial waters. . . . The real problem was, to restrict territorial waters within reasonable bounds. And here, oddly enough, Grotius pointed the way.

The problem, how to restrict the limits of territorial waters within reasonable, that is, within workable, bounds,
221 was a problem for diplimacy rather than for law. The boundary must be restricted sufficiently to remove territorial waters from the sphere of international rivalry, and to safeguard ocean traffic; within the scope of this restriction there might be a lack of uniformity as to the limits of the territorial waters of any particular state. Grotius performed an important service by suggesting that territorial waters – he called this portion of the sea, *proximum mare* – might be limited to so much as could be defended from the shore.

The theory of *dominium maris* holds that the rights of a state in its territorial waters are those of an owner over his property. The bare statement of the theory shows the need of an immediate qualification. Stypmann indicated the nature of the qualification required when he reserved the right of innocent passage for foreigners through such waters. For this property resembles at this point the property of a private individual, which is affected with a public interest under municipal law, although, in the latter case, the will of the state may prevail over the will of the private owner, whereas the control of a state over its territorial waters is absolute. Nevertheless, the existence of this public interest serves to guide the state in the exercise of its jurisdiction over its waters. The unqualified theory of *dominium maris* holds that the rights of a state over its territorial waters are those of a sovereign over his property.

Stypmann perceived that the necessities of international intercourse must limit the exercise of those rights.

The Continental defenders of the theory do not seem to have attempted to use it as a weapon for combating the pretensions of either Spain and Portugal, or of Great Britain. Nor do they seem to have been interested in the immediate furtherance of any particular nationalistic ambitions. This detached position was favorable to unbiased thought, as may be easily perceived. It was pointed out in the discussion of the origin of the dispute over the rights of a state in the sea adjacent to its coasts, in the preceding chapter, that the fundamental conflict of opinion was over the extent of the ownership of the sea, rather than over the rights of ownership of a state in its terri-
222 torial waters. It was further noted that, although this was the issue which had provoked the difference of opinion which found expression in the controversy between the advocates of a *mare liberum* and a *mare clausum*, this issue had been befogged by the divergent aspirations of the countries chiefly concerned. The British controversialists replied to a tract which was primarily concerned with attacking the claims made to the high seas by Spain and Portugal as if it had been an attack on British claims, whereas the British claims were not, essentially, the same as those of Spain and Portugal; while Grotius and his supporters made their arguments broad enough to comprehend the British claims, as if both sets of claims rested upon the same premises, the same bases, whereas in fact they did not. The point at which both sets of claims met and overlapped, or, in other words, the ground which was common to Spain and Portugal on the one hand, and to Great Britain on the other, was vaguely sensed by the parties to the controversy; but it was not clearly perceived, much less defined. The British defended

at great length what Grotius had not expressly – and, perhaps, not implicitly, for, as has been remarked, he is ambiguous on the point – denied, that is, the existence of *some* territorial waters. They perceived that he would deprive them of property rights in their coastal fisheries. And they defended their title to those rights by claiming a large part of the sea adjacent to the British Isles, including the whole of the British Channel. If they had done only this; if Selden had written his book to prove that the English kings had always owned the sea for a distance of five hundred, or fourteen miles offshore, then the issue would have been fairly clear. But they did not do this. They assumed that the existence of property rights in the sea must be demonstrated. They undertook to prove that the British sovereign possessed the title to the sea *for some distance offshore* by proving that he possessed a title to the sea. The very existence of property rights was thus called into question. The result was that the true issue was lost sight of, and the controversy raged around the new one. Yet the true issue remained to cloud thought and to warp judgments.

It was more easy to argue over the existence of territorial waters because a theory covering them had yet to be con-
223 structed. The work had been proceeding swiftly in the world of affairs; a theory was bound soon to be formulated. The controversy had this merit, that it forced a definition. But the controversialists were debarred by the exigencies of the dispute from performing this service. This is the point at which the Continental defenders of *dominium maris* come in. Aloof from the controversy, with no policies to defend, they were admirably placed for a study of the problem. The controversy had precipitated elements which had

hitherto been in solution. The European jurists (and particularly, the German jurists) studied the product and constructed their formulas. Boundaries to *mare adiacens* had already been proposed; they had been in existence, as propositions, since the age of Bartolus. The jurists left this problem to be settled by diplomacy. They concerned themselves with the nature of the rights of a sovereign in this sea. They arrived at the theory of *dominium maris*.

They arrived at this theory by two methods of reasoning. The first method involved an interchangeable use of *imperium* and *dominium*, a merging of the meaning of the one with the meaning of the other, so that the two became practically synonymous terms. The other method involved a separation of *imperium* and *dominium*, and was essentially realistic in its nature. Of the use of the first method, the work of Loccenius is perhaps the best illustration. Of the use of the second, Conring offers a first-rate example.

Maine *et al.* Ex. No. 693

Fulton, Thomas Wemyss, *The Sovereignty of the Sea*, pp. 39-45, 134-48, 152-53, 174, 192-93, 211-13, 216-41, 288-89, 301-02, 347, 352-65, 378-80, 409-13, 426-27, 440-45, 458-61, 469-70, 483-84, 487-88, 496-97, 506-07, 511-13, 517-18, 521-27, 539-41, 550-52, 571-75, 604-15, 650-52, 663-65, 681-732, 762-64 (1911).

* * *

362 Along with the development of this idea came another, which was ultimately likewise engrafted on English law—that the crown had the exclusive right of property in the sea and in the soil beneath it. The origin of the idea is to be found in a treatise written in 1569 by Thomas

Digges. — He argued that as many things — as wrecks, treasure-trove, waifs and strays, which were originally common by the law of nature — now belonged to the Prince, so also should the sea, which was the chief of all waters, and could not by the civil law become the property of a subject. He held that just as the owners of the soil had the property in a river and its banks, the king had the interest and property in the "great salt river" environing the island, and in its shores and bottom; and he speaks of the sea as the "King's river," the "King's streme," and the "King's water," in which he had also jurisdiction. Digges also claimed that the fishings in the sea belonged to the crown, for "although the Kings of England have benne content to suffer fishermen *Jure gentium* to enjoy to theire owen use such fishe as by theire charges travill and adventure they can in the Englishe Seas take, Yet have the Kings of England for remembrance of this theire favoure that the memorie of theire propertie in the Seas shoulde not be extinguished, alwaie reserved to them selves the cheif fishe as Sturgeon, Whale, &c."

The contention that the crown had the right of property in the sea and its bed, denied by Plowden, received in the reign of James much fuller amplification at the hands
363 of Serjeant Callis, whose well-known lectures of the Statute of Sewers were delivered in 1622. Callis argued that in "our *Mare Anglicanum* the king had, by the common law of England, four "powers and properties": sovereignty (*imperium regale*), legal jurisdiction for the administration of justice, property in the soil under the sea and in the water, and possession and profits both real and personal. He cites in proof a number of authorities, legal and historical, such as were cited later by Selden. The statement in a case decided in the reign of Richard II. (1377-99), that "the sea

is within the legiance of the king as of his crown of England"; the charter of the Admiral giving him power in maritime cases throughout the realm of England; the phrases in certain statutes; the right to wreck and royal fishes, and so forth, "proved the King full Lord and owner of the seas, and that the seas be within the realm of England." The king rules on the sea, he held, "by the laws imperial" as by the Roole d'Oleron and others, but only in the case of shipping and for merchants and mariners; his rights of property in the bed and waters of the sea, and the personal profits (wreck, flotsam, &c.) accruing, were his by the common law. Callis did not deal with fishing, nor attempt to define the bounds of "the seas of England" in which the king had property and jurisdiction.

The interpretation of the law as to the rights of the crown in the seas, as propounded by Callis, was followed by Selden and Hale, and generally by the lawyers who came after him. Lord Chief-Justice Coke, in his *First Institute*, which was published in 1628, explains the old phrase "within the four seas" (*infra quatuor maria*) as meaning within the kingdom and dominions of England; for if a man be upon the sea of England he is "within the kingdom or realm of England, and within the ligeance of the king of England, as of his crown of England." In his *Fourth Institute*, which was not published, however, till 1644, ten years after his death, when treating of the Admiralty Court, Coke entered more fully into the question of the rights of the crown in the seas of England; and, as already mentioned, he looked upon the roll of Edward I., *De*
364 *Superioritate Maris*, as proving that the king's right of dominion over the sea had been expressly acknowledged by neighbouring nations.

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Maine *et al.* Ex. No. 712

Keller, Arthur S., etc., *Creation of Rights of Sovereignty through Symbolic Acts 1400-1800*, pp. 3-5, 148-51 (1938)

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IX: CONCLUSIONS

ON THE BASIS of the careful study made of the great mass of materials examined for the purposes of this book and relating to the acquisition of sovereignty over *terra nullius*, it has been found possible to arrive at certain general conclusions which may be said to be expressive of practices common to all the important maritime powers of Europe during a period of several centuries.

Thus, it may be stated first of all that, throughout this lengthy period, no state appeared to regard mere discovery, in the sense of "physical" discovery or simple "visual apprehension," as being in any way sufficient *per se* to establish a right of sovereignty over, or a valid title to, *terra nullius*. Furthermore, mere disembarkation upon any portion of such regions – or even extended penetration and exploration therein – was not regarded as sufficient itself to establish such a right or title. Nor did merely giving names to regions, capes, headlands, islands, valleys, peninsulas, rivers, streams, gulfs, harbors or bays have any such results. It should be added, however, that the term "discovery" was often rather loosely applied, and, in some instances, according to the attendant circumstances, may have been intended to include the performance of a formal ceremony of taking possession. It is, of course, obvious that, in such instances, more had occurred than a discovery in the sense of a mere visual apprehension.

Next, it may be asserted on the basis of the facts that the formal ceremony of taking of possession, the symbolic act, was generally regarded as being wholly sufficient *per se* to establish immediately a right of sovereignty over, or a valid title to, areas so claimed and did not require to be supplemented by the performance of other acts,
149 such as, for example, "effective occupation." A right or title so acquired and established was deemed good against all subsequent claims set up in opposition thereto unless, perhaps, transferred by conquest or treaty, relinquished, abandoned, or successfully opposed by continued occupation on the part of some other state. Naturally enough, the details of these formal ceremonies of taking of possession did vary, often quite markedly, among the various nations concerned, but still, and most important of all, what may be termed the ultimate legal effect thereof was the same. Thus, the Portuguese and the French, as it has been brought out in the preceding chapters, were usually content with the performance of ceremonies very simple in nature, such as the mere erection of a cross or other monument bearing the royal arms. The Dutch also adhered to the simplicities and usually erected no religious symbols whatever. On the other hand, the Spanish and the English usually employed a considerably greater degree of formality in their ceremonies, the former particularly being accustomed to observe an elaborate ritual.

With very few exceptions, the discoverers and explorers in the service of the European maritime nations did not specify with any degree of precision the extent of the territory which they claimed to have acquired for their sovereigns by acts of symbolic possession. The Spanish explorers purported at times to have acquired vast territories

and even entire oceans by a single act; they proceeded, nevertheless, to take possession separately of small islands or of localities on the mainland situated at short distances from each other. The English likewise performed such repeated acts of taking of possession where it was practicable to do so, as in Spitsbergen. There are also some indications, as in the correspondence relating to Guinea and Brazil, that the extent of a nation's possessions was connected with the presence of settlements, or actual control,
150 but the materials examined herein do not permit any definite conclusions on this point.

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Maine *et al.* Ex. No. 716.

The Laws, Ordinances, and Institutions of the Admiralty of Great Britain, Civil and Military, *Vol. 1, pp. 1-13, 26-39, 112-18, 378-79, 394-95, 412-17 (1746).*

* * *

38 Besides this honorary Part, the Dominion of the Sea entitles the lawful Possessors to the six following Prerogatives, which I hope will be always attended to with a scrupulous Exactness.

I. The Royalty of granting the Liberty of fishing for Pearl, Coral and Amber, and other precious Commodities.

II. To grant Licences to fish for whole Sturgeon, Pilchard, Salmon, Herring, and all other Sort of Fish whatsoever.

III. To impose Tribute on all Ships or Vessels fishing within the Limits of the *British* Seas.

IV. The regular Execution of Justice for all Crimes committed within the said Limits.

V. To grant or refuse free Passage to foreign Ships of War thro' those Seas, in the same Manner as Troops over the Land.

Which together includes the whole Extent of modern Dominion over the Sea; and which duly regarded, cannot fail of giving suitable Lustre and Dignity to the *British* State and Nation.

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Maine *et al.* Ex. No. 718.

Lediard, Thomas, *The Naval History of England*, Vol. 1, pp. 35-43 (1735).

CHAP. X.

35 A Short *Dissertation on the Right of our Kings to the Sovereignty or Dominion of the* British *Seas.*

The *Naval* Power of *England* beginning now visibly to encrease, and continuing for the future to do so from Reign to Reign, our Kings began likewise to be more jealous of any Encroachment upon their ancient and indisputable Right to the Sovereignty or Dominion of the *British Seas*, and more zealous in the Maintenance of it. I shall find Occasion, from Time to Time, to give Instances, in what Manner some of our Monarchs have insisted upon and maintained this their Right. It may not therefore be amiss previously to inform the Reader, (1.) *What is meant by the British Seas.* (2.) *Wherein consists the Sovereignty or Dominion of these Seas: And* (3.) *Whence proceeds the Right our Kings have ever pretended to and maintained to this*

Sovereignty or Dominion. This Place not being improper for my Purpose (for a Reason which I shall observed in the Sequel) I shall do it here, in as brief a Manner as possible. And

I. All that Part of the Main or Ocean, which environs the Island of *Great Britain*, is in general called the *British Ocean.* This is subdivided into four Parts, according to the four Cardinal Points of the Compass, and these are then together known by the Name of the four *British* Seas,
36 whence some of our ancient *Saxon* Monarchs took the Title of *Basileus quatuor Marium. (King or Emperour of the four Seas.)*

(1.) Towards the *East* is the *German* Ocean, generally called the *North*-but by the *Danes, Swedes*, and other Northern Regions, named the *West*-Sea: And the Boundaries on this Side are the Shoars of those Countries opposite to *Great Britain*, that Way, as the *Netherlands, Germany, Denmark* and *Norway*.

(2.) Southward is the *British* Ocean, properly, and by *Ptolemy* particularly, so called; one Part of which is that commonly called the *Channel*, or, by the *French, la Manche*, (the Sleeve) which divides *England* and *France.* This Way the Boundaries extend to the opposite Shoars of *France*, to those of *Spain*, as far as Cape *Finisterre*, and to an imaginary Line, drawn from that Cape, in the same Parallel of Latitude, to their Boundary on the *West*, hereafter mentioned; thus taking in that Part of the *British* Seas which consists of the *Channel*, the Bay of *Biscay*, and Part of the *Atlantick* Ocean. *Mela*, in his Treatise *de situ Orbis*, Lib. 2. Cap. III. Speaking of the *British* Sea, says, it reaches as far as the *Northern* Coast of *Spain.* And the *Arabian* Geographer (Clim. 4. Part I.) says, towards the

North, Andalusia, by which Name the *Arabians* comprehend all *Spain,* is washed with the *English* Sea, adding, there are nine Stages from *Toledo* to St. *Jago's,* which Place he says (*Clim. 5. Part* I.) is situated on a Promontory of the *English* Seas; And the same Author has divers other Passages of that Kind.

(3.) On the *West* is that Sea anciently called the *Vergivian* Ocean, which, where it washes the Coast of *Scotland,* is from thence called the *Deucalidonian* Sea. That Part of it which flows between *England* and *Ireland,* is sometimes called the *Irish* Sea, anciently the *Scythian Vale,* but now St. *George's* Channel, and the Rest the *Western* or *Atlantick* Ocean.

(4.) Northwards is the Sea anciently known by the several Names of the *Hyperborean, Deucaledonian,* and *Caledonian* Ocean, now the *Scotch* Sea; in which are situate the *Orcades, Thule* and other Islands.

The proper Boundaries of the *British* Seas for the *West* and *North,* on those Quarters, are generally reckoned a Line drawn from the aforementioned imaginary Line ex-
36 tending from Cape *Finisterre,* in the Longitude of three and twenty Degrees *West* from *London,* to the Latitude of sixty-three Degrees, and thence another Line drawn, in that Parallel of Latitude, to the Middle Point of the Land *Van Staten* in *Norway;* Thereby taking in, to the *West,* that Part of them which consists of Part of the *Atlantick* Ocean, and the *Irish*-Sea, or *St. George's* Channel: (For anciently, as Mr. *Selden* observes, *Albion* and *Ireland* were many Times equally called *British* Isles, and *Britannides,* for a Proof of which he quotes many Authors:) And, to the North, that called the *Caledonian* Ocean, or *Scotch* Sea.

To the *West* and *North,* the Sea-Dominion of the Kings of *Great Britain* may properly be said to extend a great deal farther than the abovementioned Boundaries of the *British* Seas, on those Quarters. For tho' (as Mr. *Selden* observes) the vast *Western* and *Northern* Ocean (stretching out to so great a Latitude as to reach, on the one Hand, the Shoars of *America;* and, on the other, those of *Greenland,* and Parts utterly unknown) cannot all be called the *British* Seas, yet hath the King of *Great Britain* most ample Rights on both those Seas, beyond the Bounds of the *British* Name: As he most certainly has, even as far to the *West,* as *Newfoundland,* and the adjacent Parts of *North America,* by Virtue of first Invention and Occupancy thereof by *Sebastian Cabot,* for King *Henry* VII. and of a more full Possession and Occupancy by Sir *Henry Gilbert,* for Queen *Elizabeth:* And to the *North,* as far as the Shores of *Greenland,* by Virtue of the same Title of first Invention, by Sir *Hugh Willoughby,* for *Edward* VI.
36 and of the full Occupancy thereof, and the Discovery of the Use and Profit of those Seas, in the Whale-fishery, by the *English Muscovy* Company, for Queen *Mary,* and Queen *Elizabeth,* of all which I shall have Occasion to speak more particularly when I come to those Reigns. However, within the Limits before laid down, the Respect due to His Majesty's Sovereignty (of which I shall say more below) is and ought to be given.

II. The Sovereignty or Dominion in the *British* Seas consists in an exclusive Propriety over these Seas, as well with Regard to the Passage thro' them, as the Fishing within them.

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42 The Duty of the Flag, of which I just made Mention above, being a consecutive Acknowledgment, that the Right and *Dominion* of the *Seas* are in him to whose Flag others strike and pay that Hommage, implying that the Prince grants a general Licence for Ships to pass thro' his *Seas*, that are his Friends, paying him that Duty; I shall say a Word or two wherein consists this Duty of the Flag.

The Duty required is, in a few Words, this; That all Ships or Vessels, which the *British* Men of War meet with on those Seas, do strike their Flag, and lower their Top-sail; or, where they have no Flag, that they lower their Topsail only, in Acknowledgment of His Majesty's Sovereignty therein.

This Custom of striking the Flag, or Top-sail, has prevailed in the *British* Seas, likewise, by Prescription of Time immemorial, having been ever attendant on the Crown thereof; and so is to be looked upon, not as an honorary Salute or Ceremony, but as an absolute Sign of the Acknowledgment of the Right of that Dominion. For the Antiquity of which I refer to the ancient and ample Testimony, in that memorable Record of King *John*, entitled the *Ordinance* at *Hastings*, of which I have already given a Copy, and a Translation, in that King's Reign.

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Maine *et al.* Ex. No. 719

Lounsbury, Ralph Greenlee, The British Fishery at Newfoundland, 1634-1763, pp. 30-31, 50-55, 61, 76-95, 102-04, 108-16, 126-33, 137, 147, 182-89, 229-43 (1969).

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50 . . . The West Country people tried continuously from 1621 to 1628 to obtain the passage of legislation which would establish the "free" fishery on a statutory basis and prohibit monopolies such as that which Sir Ferdinando Gorges was attempting to enforce on the coast of New England or that which Guy's group desired at Newfoundland. On April 17, 1621, "An Act for the freer liberty of fishing and fishing voyages to be made and performed in the seacoast and places of Newfoundland, Virginia, New England, and other seacoasts and parts of America" was introduced in the House of Commons. The bill proclaimed that the free right of engaging in the fishery tended greatly to increase the number of ships and seamen, but that owing to recent attempts to interfere with the freedom of the fishermen, it should hereafter be provided that all English subjects should have the free right to fish on the shores of America, to select places for curing fish according to priority of arrival, and to take wood for fuel and repairs. The bill passed the third reading on December 1 of the same year, but it was never considered by the House of Lords. Undaunted by this failure the West Country interests tried again in 1624, a similar bill
51 being introduced in the Commons on February 25. It was amended in committee, and brought up for the third reading on April 29, but consideration was deferred until May 4, when it was finally read and debated, though no vote appears to have been taken. The identical bill seems to have been resubmitted in 1625, when it passed the lower chamber, but again failed to receive consideration from the Lords. The West Country members of the House of Commons persisted in their attempts to pass such legislation, the bill being reintroduced regularly in each session of Parliament until 1628. Friends of the "free" fishery never secured the desired protection by statute, and con-

firmation of the old fishing customs had to be secured from the crown during the years when Charles I ruled without parliament.

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53 The reason for the stir created over the New England fishery arose not only from the more favorable situation of that region as a place of permanent settlement, but also from the fact that the monopolists were able to entrench themselves more firmly in the more southerly region than was possible at Newfoundland. The failure of the London and Bristol Company was in large part due to its attempt to drive out a well established vested interest, the beginnings of which date far back into the sixteenth century. On the other hand, the patentees of New England developed the fishery there concurrently with the establishment of permanent settlements, and the western adventurers who attempted to fish in that region were the interlopers.

* * *

61 The war with France intensified the rivalry of the two nations in the North American fisheries. The various projects of colonization undertaken by the French and English in northeastern America were the direct result of increasing commercial competition. In not a few cases plantations were projected as much for the protection of the fisheries as for the exploitation of the territories occupied. Sir William Alexander's attempt in Nova Scotia, the Kirke project in Canada, and later the grant to the marquis of Hamilton, the earl of Pembroke, and Sir David Kirke in Newfoundland were designed partly to offset French expansion in the fisheries. The French likewise strove to extend the bounds of their control over land and

water. Their fisheries were closed to all but subjects of the French king, and they planned to create a great training school for seamen in the North Atlantic fisheries. They developed a sedentary fishery along the coasts of Acadia and Canada. In the process of extending their fishing industry they drove Lord Ochiltree's colony out of Cape Breton Island. All of these activities were but the prologue to the great struggle which was to take place after the Civil Wars and in the eighteenth century for control of the new continent.

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103 . . . By 1656, the government was well aware of the importance of Newfoundland and the other English fisheries. During this period some relief was given to the western adventurers by relaxing the requirements relative to the impressment of seamen in the Newfoundland trade. In 1659, when the Council of Trade was established by act of parliament, one of its duties was to encourage the fishing on the coasts of England, Scotland, Ireland, and Newfoundland. It is significant that the New England fishery was omitted from the act, probably because the people of that region were conducting the industry so successfully that they had no cause to bring pressure upon the home government. . . .

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Maine *et al.* Ex. No. 720

McFarland, Raymond, *A History of the New England Fisheries*, pp. 26-35, 64, 69-75, 78-81, 98-101, 113-20, 125-27 (1911).

26 During these years the Newfoundland fishing business prospered and increased with all nations engaged in it.

The profits already were so manifest that the English early desired a monopoly of the privilege of making and curing the fish on the island. Merchants had begun to quarrel among themselves for the advantage of shore locations. After the accession of Elizabeth to the throne there was greater activity in her seafaring subjects. In 1577, there was a total of 315 sails at Newfoundland, some authorities placing the number as high as four hundred. France was still in the lead with 150 ships. Spain had about 100, Portugal had 50, while England had but fifteen sails. England still sent fishing vessels to Iceland, and this fact may account for the small number sent to Newfoundland. Sabine states that the English ships were superior to those of the other nations, that they gave protection to the others, and exacted tribute or payment for the service.

Nearly half a century had now passed since the English made their first attempt to establish a permanent settlement in America. The merchants of the day realized the disadvantage of carrying on the fisheries at so great a distance from the base of supply; they saw that a colony in the New World would facilitate the prosecution of the Newfoundland fisheries and would lead to the development of other kinds of business. Further attempts at colonization, therefore, were quickened by the desire to place the American fishing interests on a more economical basis.

In 1578, Sir Humphrey Gilbert had secured letters patent to discover, settle and regulate these remote countries. Previous to his departure from England the government sent Sir Thomas Hampshire to the fishing grounds of
27 Newfoundland for the purpose of settling disputes about the preemption of shore stations. Gilbert arrived at Newfoundland in 1583 with a charter for colonization, the first of its kind that was issued by the English government. He

took possession of the island and all surrounding lands within a circumference of two hundred leagues in the name of Queen Elizabeth. His right was acknowledged by the fishermen of the vessels at Saint John's at the time of his arrival, who paid him quit-rent for privileges that he granted to them.

England's claim to Newfoundland and its fishing grounds rested on the results of the discovery by Cabot in 1497. Subsequently, her rights to this claim were emphasized by Gilbert's acts at this time. Apparently the English held the right to exclude the vessels of all other nations from the fishing grounds; possibly she compelled the acknowledgment of this right, for in 1585 Sir Bernard Drake with a fleet of ships captured and sent back to England several vessels of the fishing fleet laden with furs and fish.

* * *

31 While the French were engaged in colonizing in Acadia and in exploring the adjacent coasts, the English, too, were making explorations and discoveries for themselves on the New England coast. Bartholomew Gosnold, in March, 1602, made the first direct voyage across the Atlantic to New England and commenced the fisheries on
32 these shores. He gave to Cape Cod its present name on account of the multitude of fish that he took near it. Continuing his way southward he built a storehouse and fort on Elizabeth Island, intending to establish a permanent settlement there. But when the time came for his ship to return, the intended colonists to a man embarked aboard the vessel and returned with Gosnold to England. Gosnold spread most favorable reports of the new country, declaring among other things that the fishing was superior to that on the banks of Newfoundland.

Several merchants of Bristol became interested in such enterprises and sent out Martin Pring in 1603 with two vessels. Pring reached the coast of Maine near Penobscot Bay, discovered and named Fox Island from several silver-gray foxes that he saw there, and coasted as far south as Martha's Vineyard. He entered Plymouth Harbor where he remained six weeks, exploring the region, becoming acquainted with the natives, gathering cargoes of sassafras,
32 and even planting seeds to test the soil. He gave the name of Saint John's Harbor to the place, and, after loading his vessels, sailed for England. He confirmed Gosnold's statement that the fisheries of New England were superior to those of Newfoundland. "Thus two years before Champlain explored Plymouth Harbor, naming it Port of Cape Saint Louis, ten years before the Dutch visited the place, calling it Crane Bay, and seventeen years before the arrival of the Leyden Pilgrims, Englishmen became familiar with the whole region, and loaded their ships with the fragrant products of the neighboring woods."

In 1605, George Waymouth, under the patronage of several Englishmen of rank, came to the Maine coast in the vicinity of Penobscot Bay. Waymouth, like Gosnold and Pring, considered the fishing prospects of the coast of Maine greater than those of Newfoundland. An account
33 of the voyage published in London the same year relates that as they were setting sail for England they caught very large fish, so that there was good ground to warrant "in a short voyage, with good fishers, to make a more profitable return from hence than from Newfoundland; the fish being so much greater, better fed," and more to the same purpose.

The effect of these voyages and reports was to arouse the zeal of other Englishmen to undertake colonization in this quarter of the New World. The narrative of Waymouth's voyage was published at once, and attracted the notice of Sir John Popham, chief-justice of England. Popham, with his brother George, Sir Ferdinando Gorges, and other men of influence, became interested in a project to found a colony near the fishing grounds of New England. Accordingly, in 1607, a vessel was sent out, which reached the mouth of the Kennebec River in August. At a place called Saint George the colonists built cabins, a storehouse and some slight fortifications; they also built a pinnance called the "Virginia," the first vessel built in New England, which crossed the Atlantic several times. Under the command of their president, George Popham, forty-five emigrants were left on the shore for that winter. The following year a ship returned to announce the death of the chief-justice; the colonists became disheartened at the prospects of the enterprise, and the settlement was abandoned.

This attempt to establish a colony on the coast of Maine sprang from a desire on the part of English merchants to have a permanent base in New England for the better prosecution of the shore fisheries. Great credit is due to Sir Ferdinando Gorges for his interest in American colonization. He was an Episcopalian, a firm friend of the Stuarts, and a member of the Plymouth Council. His immediate objects were to establish fisheries, to erect saw-
34 mills, and to open communication with the Indians. "It may be admitted that his purposes were entirely personal, and that he aimed solely to acquire wealth; but still, whatever were his motives, the voyage of Challon, in 1605; the enterprise of the Pophams and the Gilberts to the Kennebec, the following year, in which he had an interest; the

voyages for fishing and trade of Richard Vines, his agent, steadily pursued for years in a ship purchased with his own money; the adventure of Dermer to the island of Monhegan, under his auspices in 1619; the aid he offered to Sir William Alexander, in 1621, to procure the patent of Nova Scotia; the grant obtained by John Mason and himself to the country between the Merrimac and Kennebec rivers, in 1622; and the subsequent grant in his own individual right, to the territory between the Piscataqua and Kennebec, . . . were all beneficial to New England, and hastened its settlement." The policy of Gorges has been described as one of peace and good-will, and he himself has been styled the Father of New England Colonization.

English traders and fishermen appeared on the coast of Maine with a strong force in 1611. There seem to have been scattered settlers in the region of Pemaquid, and doubtless the fur dealers had agents in this region who lived there the year round. Three years later the New England coast was visited by the father of the Virginia Colony, Capt. John Smith. He touched the coast near the Penobscot River, explored the bays and harbors, visited Cape Ann, Cape Cod, Massachusetts Bay, entered Saint John's Harbor and changed its name to Plymouth, and gave to this whole region the beloved name of New England.

Smith had printed in London, in 1616, "A Description of New England" which was "writ with his oune hand,"
35 and, together with maps of the region, was distributed throughout the western counties of England. In this account of his voyages Smith pays considerable attention to the condition of the fisheries, entering into elaborate details. He tells us that they were successful in taking 17,000

fish in the vicinity of Monhegan Island, although their intentions had been to "take whales, and make trials of a mine of gold and copper." The better quality of the fish of this catch were sold in England for "five pounds the hundredth, the rest by ill usage betwixt three pounds and fifty shillings." Another ship stayed on the coast to fit herself with dry fish, which later sold at a good price in Spain. Smith makes the prediction that the fisheries of New England would prove a greater treasure than the gold and silver mines of the king of Spain. He goes on to draw a contrast between the relative advantages afforded by Newfoundland and New England in the fisheries, always with the advantage in favor of the latter region. His references to the fisheries of Newfoundland would lead one to infer that annually 800 sail of vessels were freighted with fish from that place.

The result of all these voyages and explorations, especially of those made since the opening of the seventeenth century, was directly influential in developing English fisheries in New England and in shaping and stimulating permanent colonization. . . . .

* * *

64 Previous to the year 1650, the colony of Plymouth had permitted the inhabitants of Hull to seine for fish at Cape Cod. Some irregularities took place at the Cape about this time and the colony took the matter into their own hands. Mr. John Stone was forbidden to fish longer in that region. On the other hand, permission was given to three residents of Plymouth, and to others from Plymouth, Nauset, or Duxbury who should join them, to engage in the bass fishery at Cape Cod , and to use wood as they might need. The next year the privilege was given to the same persons and to William Bradford for three years'

time. The regulations provided for the establishment of two companies only to engage in the fisheries there. The fisheries of Cape Cod were carried on by the Plymouth Colony, usually by annual leases, until the union of the colony with Massachusetts Bay in 1692. During the greater part of the period they were subject to continual annoyance from the Massachusetts fishermen. When the colonies became united, the inter-colonial troubles ceased.

* * *

72 The relations between the fishermen of New England and their French neighbors were critical and hostile. A brief explanation of the political conditions at the time will readily account for this animosity. Acadia was the scene of strife, partly because of the excellent fisheries in its waters that each party wished to monopolize, partly because the land had been held alternately by each country, either through seizure or concession. When Acadia passed into the possession of France in 1667 the bounds of the province were not clearly defined; the English claimed that the western boundary was the Penobscot River, the French laid claim to the land as far west as the Kennebec River. Consequently, the region was again open to strife and quarrels between the two classes of fishermen. The French took pains to embitter the Indians against the English; and in several instances used the Indians as their allies in making attacks upon the settlements, especially in the frontier region between the Merrimac River and Pemaquid. This stretch of the coast of Maine was the scene of atrocious warfare during the forty years that followed.

De Bourg, the French governor of Acadia, in 1675, not only prohibited his people from intercourse with the Protestant fishermen, but also levied a tax of four hundred codfish on every English colonial vessel found fishing on

the coasts of Acadia. the French officers seized all who did not pay the fine, and took from them whatever fish they had aboard together with the provisions and outfits. Two years later, about twenty fishermen from Salem were
73 captured on the coast of Maine by the Indians. In the fight that ensued, several men were killed and a score were wounded. When news of the engagement reached Salem, a large vessel was fitted out and sent to recapture the boats and men; but the natives, plundering and abandoning the ketches, left before their pursuers could do them harm. "In the lapse of a few years," says Sabine, "the fishermen at Cape Porpoise were either slaughtered or driven off, and the settlement there laid desolute; a fishing smack was intercepted near Portland, three of her crew killed, and the remainder carried into captivity; eight fishing vessels were captured at the Fox Islands; the coast for more than a hundred miles was abandoned, and the wretched men who depended upon the sea for support, without shelter, and too scattered for concert and resistance, were compelled to suspend their employments."

It had now become evident to the thoughtful people of New England that the only way to secure the peaceful prosecution of their fisheries along the coasts of Maine and Nova Scotia was by the expulsion of the French. The accession of William and Mary to the throne of England brought on war between that country and France. The struggle was taken up by the colonists on this side. Sir William Phipps, a native of Maine, led an expedition against Nova Scotia in 1690, which he succeeded in capturing from the French. The victory was fruitless, however, as the province was re-taken by the French the next year.

The French, realizing the importance of the American fisheries, renewed their efforts to retain hold upon their colonies. Under the leadership of Baron de Castin, a trading fort was established at the mouth of the Penobscot, now the town of Castine. The French officials and Jesuits

74 enlisted the sympathy and services of the Indians, who assisted them in carrying on their depredations against the English colonists. The fort at last was taken by Iberville and Castine in 1696, thus extending the frontier of the French dominion into the heart of Maine, and putting to an end, for a time, the fisheries in that region. This condition of affairs emphasized rather than weakened the conviction in the minds of the New Englanders that the French should be driven from the North Atlantic coast of America.

By the treaty of peace at Ryswick, in 1697, the French retained possession of the whole coast, islands and fishing grounds, from the Penobscot River to beyond Labrador, with the exception of the eastern half of Newfoundland, which was held by the English. The country lying between the Penobscot and Kennebec Rivers was left in dispute, but it was claimed by the French in spite of the fact that no settlements had been made there to substantiate their claim.

The evil effects of the treaty were soon manifest. Scarcely a year had elapsed before the French laid claim to the sole ownership of all the fisheries. The king of France sent over an order for the seizure of all vessels other than French found in Nova Scotia waters. A rigid enforcement of this order was attempted. Bonaventure, of the ship-of-war *Envieux*, boarded and sent home every English colonial vessel found trespassing within his jurisdiction. From Villabon, governor of Nova Scotia, came an official despatch to Massachusetts that he had received instructions from his royal

master to seize every colonial fisherman found east of the Kennebec River.

At the end of the century the strife between the French and English "for the monopoly and the mastery" of af-
75 fairs in America had no immediate prospect of settlement. Of the two, the French had the advantage. They laid claim to all the fishing grounds between Maine and Labrador. The only fisheries that were open and free to the English subjects were those of the eastern half of Newfoundland and that part of New England between the Kennebec River and Long Island Sound. . . .

* * *

78 During the course of their development in the eighteenth century the fisheries of New England attained a commanding position in commerce, in legislation, and in international affairs. In extent and value, the fisheries reached their culmination at the outbreak of the Revolutionary War when over a thousand vessels gave employment to upwards of ten thousand men. For three score years they played an active and aggressive part in the struggle between England and France for mastery in North America, indirectly by keeping England awake to the necessity of securing the provincial fishing grounds for her own subjects; directly, by the capture of Nova Scotia and the taking of Louisburg, the stronghold of France in America. When the common foe had been driven from the field the colonies and the mother country turned upon each other. The colonies openly violated measures that were passed prejudicial to their interests. England looked upon her colonial subjects as means for developing her industries and influence at home, she attempted to enforce her laws upon the people of America, and, failing in that, passed a law that was

designed to cripple the commerce of New England and to drive her fishermen from the sea.

The beginning of the reign of Queen Anne found France and England involved in a new war. One of the causes of the struggle was the claim of France to a part of Maine and to the whole of the fishing grounds from the Kennebec River to Labrador. The French seemed determined to
79 defend all their claims. They had between 400 and 500 vessels engaged in the fishery; they were well armed; they outdid their competitors in the quantity of fish that they caught, claiming, at the opening of the century, that their catch of codfish was equal to the supply of all continental or Catholic Europe; their fishermen were first in European markets, and their fish sold at a larger profit than that of their rivals. The outlook for England to retain what few fishing privileges she possessed in America was nearly as dubious as was the prospect that she could regain in war the advantages that had been lost through shameful treaty.

The people of New England, feeling keenly the loss of a province that had been won very largely by their valor, and stirred to action by the loss of the privilege to fish upon the Acadian fishing grounds, needed little urging from the mother country to enter heartily into the contest. They employed armed vessels of their own; they swept the coast of Nova Scotia; they equipped a fleet at Boston and twice attempted the conquest of that province; and they furnished four battalions of fifteen hundred men and thirty transport vessels to Nicholson when, in 1710, he captured Port Royal, thus finally winning Nova Scotia as a province under the crown of Great Britain.

Peace was concluded by the treaty of Utrecht in 1713. By this treaty the British statesmen attained, or supposed that they had attained, what had been their ambition for many years, – the supremacy in the fisheries of the American seas. All Nova Scotia, or ancient Acadia with its boundaries, was made over to the Queen of England and her successors. The French were excluded from fishing on the coast of that province or within thirty leagues of it, from Sable Island to the southwest. Newfoundland with the adjacent islands came wholly into the right of Great Britain, as did Hudson Bay with its borders. On
80 the other hand, the French were given possession of, and the right to fortify, the Island of Cape Breton and all other islands both within the mouth of the Gulf of Saint Lawrence and in the Gulf itself. At Newfoundland they were allowed to catch fish and to dry them on land from Cape Bonavista to the northern point of the island, and thence down the western coast as far as Point Riche. They were prohibited from settling or fortifying any place on the island of Newfoundland.

When all things are considered one must conclude that the treaty was greatly to the advantage of Great Britain. If adhered to strictly, it meant that the fishermen of New England would secure a monopoly of the fisheries of the coast of Maine, the Bay of Fundy, and the shore and bank fisheries of Nova Scotia, with equal chance to compete with French fishermen in all other fisheries. The narrow limits of the French possessions would result in a serious curtailment of their fisheries. Butter opposition, however, was aroused in England because France had been given any privileges whatever in American waters. Lord Oxford was impeached because he dared to advise his sovereign that

"the subjects of France should have the liberty of fishing and drying fish in Newfoundland."

* * *

99 When the time came for determining conditions of peace in 1763 there was a strong party in England opposed to granting to the subjects of France any privileges in Amer-
100 ica. The causes for so determined an attitude are not difficult to be seen. Time and time again France had been the favored party in negotiations referring to rights and privileges in North America. Beginning with the treaty of Saint Germain, in 1632, concessions were made favorable to the subjects of France. These were continued by the terms of the treaty of Breda, in 1667, confirmed by the treaty of London twenty-one years later, increased by that of Ryswick, in 1697, and so changed by the treaty of Utrecht that French fisheries, instead of being seriously curtailed, actually increased under its provisions during the half-century preceding the close of the Seven Years War.

The prosperity of their rivals was viewed by the fishermen of New England and Great Britain with envy and with dread. The record of their own military triumphs in Nova Scotia, Cape Breton and Quebec made the New Englander feel that the French were privileged to enjoy what by right of conquest should have belonged to them fifty or more years previous. Their recent success in the Gulf of Saint Lawrence had demonstrated clearly the true value of those fishing grounds and served to increase the feeling of resentment. But beyond the question of justice

and economy was the more significant one of permanent menace. The people of New England never could feel safe in pursuing this industry of the sea nor could they be assured of its continuance as long as the French remained in permanent possession of the land and much of the sea in regions adjoining their own, on the north and east. The colonists had hoped for more than a half-century that the idea of excluding the French from North America might prevail in English politics. England at heart hoped for the same, but heretofore her continental interests had led her always to sacrifice the welfare of her colonies in America when settling accounts with France. From the Stuarts
101 down to the American Revolution it was the policy of England not only to neglect but even to oppress and restrain the commerce and navigation of New England. The continued neglect of the colonists' interests and the strong protests of the people served to arouse and maintain a sentiment in England for the exclusion of the French from America.

The terms of the treaty were extremely harsh towards the French. By a stroke of the pen France transferred her empire in America to the crown of Great Britain. She lost forever the control of the vast region extending from the mouth of the Mississippi to the Rockies, northward to the Hudson Bay region, and eastward to the Alleghenies, through the valley of the Saint Lawrence, and out to the shores of the Atlantic. The only territory retained by France was the small islands of St. Pierre and Miquelon, situated on the Newfoundland coast. The labors of Champlain, Hennepin and La Salle in establishing a mighty French power in America were set at naught in a single day. Added to the losses of power and territory was the serious curtailment of her fishing privileges. Henceforth

France was practically excluded from shore fisheries at Nova Scotia, Cape Breton Island, the islands of the Gulf of Saint Lawrence and the southern coast of Newfoundland. The three league limit applied to the Gulf of Saint Lawrence would exclude the subjects of France from its richest shore fisheries, leaving them only the deeper waters of that inland sea.

The dreams of France for supremacy in America were over, her hopes for a monopoly of the fishing industries were shattered. The ravages of war, the loss of territory, and the restraint placed upon her fisheries were too powerful agents for her merchants and fishermen to combat successfully. France never again regained her prestige in American waters, although she had 250 vessels employed at Newfoundland in 1768.

* * *

113 Lord North recognized the great importance of the fisheries to the New England people; and he made it plain in his bill that he could conceive no quicker or surer method of securing obedience to British laws than to strike directly at the corner-stone of New England industries. The conditions of the bill that referred to the fisheries were very explicit. All vessels and ships which were the property of persons living in New England were prohibited from carrying on the fisheries upon the banks of Newfoundland, on the coast of Labrador, within the Gulf of Saint Lawrence, or upon the coasts of Cape Breton, or of Nova Scotia, or any other part of the coast of North America. The penalty for disobedience was forfeiture of the vessel, her cargo, apparatus and supplies. British war ships were encouraged to visit, examine and search all vessels suspected of carrying on these fisheries contrary to the provi-

114 sions of the bill. The prohibitions and restraints imposed by the act upon trade, commerce, and the fisheries of those colonies were to cease when it was made clear that the trade and commerce of his Majesty's subjects could be carried on without interruption.

Lord North supported his measure by declaring "that as the Americans had refused to trade with Great Britain, it was but just that they should be deprived of the right to trade with any other nation. In particular, he said that the fisheries upon the Banks of Newfoundland, and the other Banks of America, were their (Great Britain's) undoubted right, and that, therefore, such disposition might be made of them as the government pleased. The two houses, he continued, had declared that a rebellion existed in Massachusetts, and that it was just to deprive that province of its fisheries; that though a government still existed in New Hampshire, the royal authority was weak, that a quantity of powder had been taken out of a fort there by an armed mob; and that, besides, the vicinity of that province of Massachusetts Bay was such, that if it were not included, the purpose of the act would be defeated. . . .

* * *

115 For the opponents, Dunning was of opinion that the Americans had a right to the banks of Newfoundland, that there was no rebellion in Massachusetts, but even if so, he failed to see why New Hampshire, Rhode Island and Connecticut should be punished for acts of another province. He declared that "the ministry were the best authors for a receipt to *make* rebellion."

Governor Johnstone said that the measure was absurd and cruel, that the project to starve a whole people, except such as the governor should think proper to favor, was inhuman; the God of nature had given these fisheries

to *New* England and not to *Old* England; his long experience in the British navy had taught him that it was a constant practice of the service for the British cruisers to share the fishing craft of an enemy's coast, thinking it savage and barbarous to deprive the miserable inhabitants of the seacoast of their daily food and the means of procuring it.

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Maine *et al.* Ex. No. 721

Maine Historical Society,
***Collections,* Vol. V, pp. 75-81 (1857).**
Instructions for the Settlement of Pemaquid

* * *

77 It shall not be Lawfull for any Vessells Crew that belongeth not to the Government to make a Voyage in the Government, except he hath an house & staye within the Government on penalty of forfeiture of paying for makeing his voyage.

It shall not be lawfull for any Vessell or Vessells that do not belong to this Goverm' to make an herring Voyage at Mount Niles (?) or any other place within this Government upon penalty thought fitt by you.

It shall not be lawfull for fishermen to keep any more dogges then one to a family on such penalty & forfeiture as shall be thought fitt by you.

* * *

78 That all Vessells out of any Government if they com to trade or fish shall first enter at Pemaquid or the places appointed & that they shall not goe into any other Harbour except by stress of Weather but first to Cleare & give an Account of their design & not to break bulk before they have so Cleared & then proceed to trade or fish as license or permitt may be granted on penalty.

That no Vessell or boates Crew shall break bulk or dispose of any fish till the first of June on penalty.

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Maine *et al.* Ex. No. 722

Malynes, Gerald, *Lex Mercatoria: Or, The Ancient Law-Merchant*, p. 2 (1686).

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2 Princes and Potentates by their Prerogatives (respecting the Law of Nations) do permit amongst themselves a free travelling by land through their several Kingdoms, Territories, and Dominions, unless they be open enemies: they hold likewise a community of the Seas for Navigation, as also a distinct dominion of the Seas adjoyning to the Territories and Jurisdiction of their countries, they take Custom, Subsidies and all manner of Imposition upon the commodities imported and exported out of their Harbours, Havens, and Ports, as also for the fishing in their Seas, Streams and Dominions; of all which the Merchant is to take especiall notice, to avoid danger in the Traffic and Trade with their Subjects, for non-payment of the same, which they claim *jure gentium.*

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Maine *et al.* Ex. No. 726

Molloy, Charles, *De Jure Maritimo et Navali: Or A Treatise of Affairs Maritime, and of Commerce*, Vol. 1, pp. 72-73, 82-83, 102-31 (1769).

* * *

83 XI. Piracy committed by the Subjects of the *French* King, or of any other Prince or Republick, in amity with the Crown of *England* upon the *British* Seas, is punishable properly by the Crown of *England* only, for the Kings of the same have *isiud regimen & dominium exclusive* of the Kings of *France*, and all other Princes and States whatsoever.

* * *

103 II. That Princes may have an *exclusive property in the Sovereignty of the several parts of the Sea, and in the passage, Fishing and Shores*, is so evidently true by way of fact, as no man that is not desperately impudent can deny it;
104 the Considerations of the general *practice* in all Maritime Countries, the necessity of *order* in mutual Commerce, and the *Safety* of mens persons, goods, and lives, hath taught even the most *Barbarous Nations* to know by the Light of *human Reason*, that *Laws* are as equally necessary for the Government and Preservation of the Sea, as those that negotiate and trade on the firm Land; and that to make *Laws*, and to give them the *Life* of Execution, must of necessity require a *supream Authority;* for to leave every part of the Sea and Shores to an *arbitrary and promiscuous Use*, without a correcting and securing Power in case of wrong or danger, is to make Men in the like Condition with the Fishes, where the greater devour and swallow the less.

* * *

109 VIII. Now the Duty of the Flag is no more but a consecutive acknowledgment that the *Right* and *Dominion* of the *British Seas* (not as a bare *Honorary Salute* or *Ceremony*, but as an *absolute Sign* of the Right and *Sovereignty* of those *Seas* where they are obliged to strike Sail; are in him to whose *Flag* they veil, and pay that duty to; and in substance is no more, but that the King grants a general Licence for Ships to pass through his Seas, that are his Friends, paying that obeisance and duty, like those services when Lords grant out Estates, reserving a *Rose* or *Pepper-Corn*, the value of which is not regarded, but the

remembrance and acknowledgment of their *Benefactor's Right* and *Dominion*.

* * *

118 XIII. This being the *value* which this Nation did always place upon the *Right of the Flag*, the which they never did regard only as a Civility and Respect, but as a principal Testimony of the unquestionable Right of this Nation to the Dominion and Superiority of the adjacent Seas, acknowledged generally by all the Neighbour *States* and *Princes of Europe*, and must be paid and acknowledged
119 by all *Princes* in the *World*, that shall be, or pass on the same.

The Effects of this *Dominion Universal*, or *Sovereignty* which accrue to a *Prince* are these:

1. Not only the Regality of the fishing for Pearl, Coral, Amber, &c. but likewise the Advantage of all Fish Royal, as Whales, Sturgeon, &c. and not only those, but also the direction and disposal of all other Fish, according, as they shall seem to deserve the regards of the Publick, as in *Spain*, *Portugal*, &c. is used.

2. The prescribing of Laws and Rules for Navigation, not only to his own Subjects, but unto others Strangers, whether they be Princes of equal strength and dignity with himself, or any way inferior. Thus the *Romans* did confine the *Carthaginians* to equip out no Fleets; and forbade *Antiochus* to build any more than twelve Ships of War: And if Tradition informs me right, Queen *Elizabeth* inderdicted the then *French* King to build any other or more Ships of War than what they then had, without her leave first obtained. The *Athenians* prohibited all *Median* Ships

of War to come within their Seas, and prescribed to the *Lacedemonians* with what manner of Vessels they should sail. All Histories are full of such Precedents, which Princes have enacted, either upon Agreements enforced upon the Conquered, or Capitulations betwixt them and others (their equals or inferiors) for mutual Conveniences.

3. The Power of imposing Customs, Gabels, and Taxes upon those that navigate in their Seas, or otherwise fish therein; which they do upon several rightful Claims, as protecting them from Pirates, and all other Acts of Hostilities, or assisting them with Lights and Seamarks; for which advantages common Equity obligeth those that reap benefit thereby, to repay it with some acknowledgment, which ought to be proportioned according to the favour received, and the Expence which the Prince is at to continue it unto them.

4. As it is incumbent on a Prince duly to execute Justice in his Kingdoms by Land, so the Sea being his Territory, it is requisite and a necessary effect of his Dominion, that he cause Justice to be administred in case of Maritime Delinquencies.

5. That in Case any Ships navigate in those Seas, they shall salute his floating Castles, the Ships of War, by *lowering the Topsail, striking the Flag* (those are the most usual Courses) in like manner as they do his Forts upon Land; by which sort of Submissions they are put in remembrance, that they are come into a Territory, wherein they are to own a Sovereign Power and Jurisdiction, and receive Protection from it.

These are the proper Effects of a real and absolute Sovereignty over the Seas; which how they are possessed by the *Venetians*, this ensuing Account will declare.

* * *

124 XIV. The *Maritime Dominion* by the *Laws of England* were always accounted the *Four Seas;* such as are born thereon are not *Aliens,* and to be within them is to be within the *Ligeance* of the *King* and *Realm of England.*

* * *

126 XV. The Importance of the Dominion of the Sea unto this Nation, is very great, for on that alone depends our Security, our Wealth, our Glory; from hence it is, that
127 *England* hath a Right to all those Advantages and Emoluments, which the *Venetian* Republick draws from the *Adriatick* Sea, where the Ships of the *Grand Signior,* of the *Emperor,* King of *Spain,* and *Pope pay* Customs, to maintain those *Fleets,* which give Laws to them within the *Gulph;* 'tis hereby that the *English* can shut up or open these Seas for Ships or Fleets to pass or repass them; whereto Queen *Elizabeth* had so special a regard, that when the King of *Denmark* and the *Hansiatick* Towns sollicited her Majesty to permit them free passage, they transporting Corn into *Spain,* she refused them; and when a *Protestant Fleet of Hamburgers* and others, had presumed to do so, notwithstanding her prohibition, she caused her *Naval Royal* to seize, take, burn, and spoil them, when they were passed her Maritime Territory, within sight of *Lisbon;* yielding this reason for her justification, That they not only relieved her enemy with provisions, but "had presumptuously made use of her Seas, without obtaining her Royal Permission for so doing:" 'Tis from hence, that the Crown of *England* can justly demand an account of any Ship or Ships occurring in those Seas, what their Business, and what their Intentions are; and prohibit any Prince or Republick to enter there with potent Fleets, without pre-acquainting his Majesty, and obtaining his Royal Permission; without which Dominion and Sovereignty, *England* can never live secure on shore; it being easy for any Foreign Fleets to amuse us with specious pretences, and in their passage to invade and surprise us. . . .

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Maine *et al.* Ex. No. 728

Moore, Stuart A., *A History of the Foreshore and The Law Relating Thereto with a Hitherto Unpublished Treatise By Lord Hale, Lord Hale's "De Jure Maris," and Hall's Essay on the Rights of the Crown in the Sea-shore,* pp. xxvii-liv, 20-21, 41, 50-53, 69-70, 95-96, 110, 139-40, 180-84, 233, 260-65, 668-75, 708-59, 865-69, 908-15 (3d ed. 1888).

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110 In the Public Records of the reign of Edward I, and especially in the inquisitions post-mortem, there will be found many records shewing that sea fisheries and ports and the soil of the foreshore were parcel of many manors round the coast. Space does not permit of a detailed description of them in this work, but they, together with the records hereinbefore described, go to shew that at any rate a very large proportion of the foreshore of the kingdom, if not the whole of it, except in the King's demesne manors, has been granted out subject to the rights of the public and the jurisdiction of the Crown.

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[The following portions of Exhibit 728 are extracts from Robert Hall's *Essay on the Rights of the Crown in the Sea-shore,* (1875 ed.) with Moore's editorial comments.]

668 Over the British seas, the King of England claims an absolute dominion and ownership, as Lord Paramount, against all the world. Whatever opinions foreign nations may entertain in regard to the validity of such claim, yet the subjects of the King of England do, by the common law of the realm, acknowledge and declare it to be his ancient and indisputable right.

This dominion and ownership over the British seas, vested by our law in the King, is not confined to the mere usufruct of the water, and the maritime jurisdiction, but it includes the very *fundum* or soil at the bottom of the sea. "The sea is the King's proper inheritance," and he is "Lord of the Great Waste," both land and water; "*tam "aquae quam soli.*" Selden, in his celebrated treatise on the Dominion of the Seas, would seem to contemplate this ownership of the King, as combining both jurisdiction and ownership; the one, indeed, would seem to involve the other, if Selden's doctrine to its full extent be admitted.

There are eminent writers upon natural and upon national law, who have controverted Selden's doctrines, and have denied the King of England's exclusive dominion, and consequently his ownership over the British seas; but however this may be, and probably will ever continue, *vexata quaestio* between such writers, we know that the
669 writers on the common and municipal law of England, as well as the decisions of our judicial courts, all speak the same language, and appropriate the dominion of the British seas *tam aquae quam soli*, to the King.

This dominion not only extends over the open seas, but also over all *creeks, arms of the sea, havens, ports,* and *tide-rivers*, as far as the reach of the tide around the coasts

of the kingdom. All waters, in short, which communicate with the sea, and are within the *flux* and *reflux* of its tides, are part and parcel of the sea itself, and subject, in all respects, to the like ownership. This is abundantly proved by the cases hereinafter referred to, where the public *right of fishing* in the creeks, arms of the sea, havens, ports, tide-rivers, &c., of the kingdom has been, in many instances, established upon the principle that they are *part of the sea*, and of the King's dominion, and as such, liable to the common law right of the subject to fish therein; of which right we shall, in a future page, take notice. (*h*)

670 Lord Hale, in the treatise ascribed to him, aptly compares the King's property in the sea and tide-rivers, creeks, &c., to the ownership of lords of manors in the common or waste lands of the manor. The soil and freehold of the

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(*h*) [The soil of the sea, estuaries, and navigable rivers, within the British dominions, was originally in the Crown, and remains so still, except in those cases where it can be proved to have legally passed into the hands of private persons. Phear on Rights of Water, p. 41. See Malcolmson *v.* O'Dea, 10 H. of L. Cases 593; R. *v.* Stimpson, 32 L.J. M.C. 208; Att.-Gen. *v.* Chambers, per Alderson, B., 4 De G.M. & G. 206, S. C. 23 L. J. Ch. 665; Blundell *v.* Caterall, per Bayley, J., 5 B. & Ald. 304; Carter *v.* Murcot, 4 Burr. 2164; but subject to the right of passage over them, see Gann *v.* Free Fishers of Whitstable Co., 11 H. of L. Cases 192, S.C. 20 C. B. N.S. 1 and 35 L.J.C.P. 29; Colchester, Mayor of, *v.* Brooke, 7 Q.B. 339, S.C. 9 Jur. 1090. In England (where it has not been granted away—Ed.) it is held to be the property reserved to the sovereign; but in Scotland it is presumed to be granted as part and pertinent of the adjacent lands, under the burthen of the Crown's right as trustee for the public uses. Bell on Law of Scotland, 5th edit. 251. See Duchess of Sutherland *v.* Watson, 6 Macph. 199, Jan. 1863. (See Scotch cases, *ante*, p. 573.—Ed.) . . . .

671 waste belong to the lord, but subject to certain rights of the manorial tenants; such as common of pasture, piscary, turbary, ways, &c., claimed and enjoyed by them, by the custom of the manor, in and out of such waste lands. So the king is lord of the great waste of the sea, subject to certain beneficial rights and privileges of fishing, navigation, &c., immemorially enjoyed by his subjects therein, by the custom of the realm, which is the common law.

The title of the King of England to the land or soil *aqua maris cooperta,* is similar to his ancient title to all the *terra firma* in his dominions, as the first and original proprietor and lord paramount. It is a fundamental principle of our laws of property in land, that all the lands in the realm belonged originally to the King; and, according to the feudal principles of our ancient laws of tenure, the landowners of England are, to this day, *tenants* to the King, holding their lands of him, as their lord paramount.

672 That part of the land which the King and his ancestors *have never granted out to the subject,* remains to the King, as his *demesnes,* in absolute ownership. The *terra firma* of England has become, almost entirely, the property (by grant and tenure) of the subject; but the *terra aqua maris cooperta* still remains to the King in wide and barren ownership.

* * *

709 The franchises, liberties, profits, and advantages derivable from the *sea,* may be considered as follows: –

1st. Fishing, *(o)* public and general, or private and several.

710 2nd. The use of the sea for the transportation of merchandise in traffic, and for ports, or for any other purpose of use or enjoyment to which it can be applied.

3rd. The perquisite of what in our law is called Wreck, *(p)* being the unclaimed ships and cargo wrecked on the shore.

The uses and profits of the *shore* are, – 1. Fishing: 2. Wreck, and its accompaniments flotsam, &c.; 3. Egress and regress, and right of Way, for the purpose of navigation, fishing, bathing, and other uses of the sea; 4. Ports; 5. The digging and carrying away its soil and materials for building, ballast, manure, &c.

Now, as we have already attributed the absolute ownership of the sea, and sea-shore, to the King, *ab origine,* – it

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709 *(o)* Whale, sturgeon, and porpoise, whenever and by whomsoever caught in the British seas, are the property of the Crown by royal prerogative. They each constitute what in our law is called a royal
710 franchise. Such franchises, however, were formerly granted away by the Crown to a subject; limited within certain districts, as a manor, hundred, &c. In Scotland, salmon seems to have been inter regalia. See Erskine's Principles.

(p) Wreck is also a royal franchise, and with the perquisites called flotsam, jetsam, and lagan, was formerly often granted within certain territorial limits to the subject, as within a manor, hundred, &c. 1 Bl. Com. 290.

The above regalia, or royal franchises, are possessed by the Crown, not in respect of the land or soil of the shore, or the ownership of the sea, but by the royal prerogative, in distinct and peculiar ownership.

711 might be thought that the above perquisites are absolutely his own, and grantable exclusively to any one of his subjects. But according to the acknowledged law of the land, although the King is owner of this great waste, *yet the common people of England have regularly a liberty of fishing in the sea, and creeks and arms thereof, and in navigable rivers within the tides, as a public common of piscary.*

This public or general right of fishing in the sea, claimed by the subject, is a beneficial privilege enjoyed by British subjects, time out of mind. Whether, in fact, it was originally a public grant from the King, or whether it was a reservation by the people of such right, when they vested the rest of the property of the sea in him, or whether it be one of those natural and necessary rights which, like the air we breathe, has ever been free and unquestioned in enjoyment, is immaterial; for the conclusion is the same; *viz.* that such right of fishing has immemorially belonged to, and been enjoyed by the public, and that, in point of title, it is admitted to be held and enjoyed *by common right, i.e.,* by the common law, and custom of the Realm.

713 The use of the sea, *as a great high way,* for the transportation of merchandise, or any other purpose for which its waters can be usefully navigated, is also a liberty or privilege belonging of common right to the people of England, by the same title as the fishery.

But wreck, and royal fish, are royal franchises, belonging exclusively to the King, by the Prerogative of the Crown
714 or to individuals, deriving them, as an exclusive private possession from the Crown. For the present we will confine our view to the *fishery.*

715 The public right, or common of piscary, claimed and allowed by the common law to the people of England in the sea, extends, not only over the open sea, but over all bays, creeks, ports, havens, arms of the sea, and tide-rivers, up to the reach of the tide, and also, as it would seem, *over and upon the sea-shore itself,* for such kinds of fish
716 as are usually caught upon the rocks, and sands of the coast. But in some cases, statute law has set bounds to the exercise of this right, in respect of seasons, particular kinds of fish, and manner of fishing. There are also other excepted cases; *viz.* where private individuals, or Corporate bodies, claim and enjoy a separate fishery, in some particular places in derogation and exclusion of the general right. *(c)*

This divides the right of fishery into "communis pisca-

(c) (These cases are very numerous. The Editor has made a large collection of documents from the public records which shews the existence of several fisheries throughout the rivers and estuaries of the kingdom. The collection, though large, is by no means complete or exhaustive. There is, however, very little doubt that in ancient times, when fish both from fresh and salt water was an exceedingly valuable article of food, the rights of fisheries were jealously watched. Every non-tidal river was covered with several fisheries from the source to the tide, and in nearly all the tidal rivers there existed similar fisheries extending all over the tidal part of the river and far into the estuary, and in many cases they exist upon the open shore of the sea. A list of the places in which records are found of the existence of several fisheries both in tidal and non-tidal waters, with some remarks on this subject, is given in the Appendix II. at the end of this volume. Mr. Hall's remarks would lead the reader to infer that cases of several fisheries in the tidal water were as rare as cases of foreshore in the hands of the subject are according to his contention. The facts are precisely opposed to the inference he endeavours to draw. See the Appendix II.–Ed.).

717 ria," or the public common of piscary mentioned above, and the *several*, or *private* fishery belonging to particular owners, and excluding all other persons. The *several* fishery is claimed and enjoyed by *prescription*, or *ancient usage*, presupposing a grant, or by express grant from the Crown, anterior to Magna Charta. *(f)*

* * *

(f) [In Allen *v.* Donelly, 5 Ir. C. L. Rep. 229, the petitioner claimed an exclusive right of fishing in an arm of the sea, and a public navigable river, and the petitioner prayed that he might be quieted in possession by an injunction. The respondent relied on the general common law right of fishery in the sea, but it was held that the Court had jurisdiction to entertain such a suit, and the petitioner need not be left exclusively to his common law remedy. In O'Neill *v.* Allen, 9 Ir. C. L. R. 132, the plaintiff in support of a claim to a several fishery in the open sea, proved an adventurer's certificate of the year 1666 acts of ownership by parties unconnected with the person found entitled to the fishery by the certificate, were proved from 1668 to 1701. No such act was proved from that date to 1798, but from 1798 to 1857 there was undisturbed user by the O'Neill family, from whom the plaintiff derived. It was held that a several fishery was rightly found, that the granting of a patent subsequently to 1668 might have been presumed; but that 17 & 18, Car. 2, c. 2, rendered such presumption unnecessary. Whether a several fishery is such a franchise as can be lost by non-user was not decided, but if it were, the absence of evidence of user from 1701 to 1799, did not amount to proof of non-user. (It has since been decided that a several fishery cannot be abandoned: Neill *v.* Duke of Devonshire, 8 App. Cas. 151.–Ed.). See also Little *v.* Wingfield, 8 Ir. C. L. Rep. 279; and 11 Ir. C. L. Rep. 63; Malcolmson *v.* O'Dea, 10 House of Lords Cases, 593. And, in the United States, the right of fishery may be granted by the States in the navigable waters in their borders, to individuals, provided the free use of the waters for purposes of navigation and commercial intercourse be not interrupted; I Kent Com. 489; Rogers *v.* Jones, I Wend. 237. An exclusive right, however, must be shown, and if

(continued)

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APPENDIX II.

Notes as to the Existence of Several Fisheries around the Coasts and in the Tidal and Non-tidal Rivers of the Kingdom.

As to the existence of a several fishery upon the sea-shore and in tidal rivers, Mr. Hall, *ante*, p. 716, in treating of the public right of fishing in the sea and tidal waters, says that the right is general, but that "there are also other excepted cases, *viz.* where private individuals or corporate bodies claim and enjoy a separate fishery in some particular places in derogation and exclusion of the general right." He gives three instances only, and would seem to treat several fisheries as he does express grants of foreshore. He is evidently under the impression that cases of several fisheries in the hands of a subject are infrequent and exceptional. In this he is wholly mistaken. The true fact is, as can be shewn from the records, that all, or almost all, tidal rivers and estuaries were in ancient times, and where the right still remains valuable still are, covered by several fisheries in the hands of the subject. The River Tweed is entirely covered by them; the Tyne also from its mouth upwards; the Aln, the Coquet, the Wansbeck, the Wear, and the Tees are in the same case; many of the manors on the Humber have several fisheries appurtenant to them; the tidal waters of the Ouse, Derwent, Ayre, Calder, and Don

(f) (continued) it can be shown, it may be exercised exclusively, though the presumption is against it, unless a prescriptive right, or express legislative grant, can be given in evidence; for such right shall not be presumed, but the contrary, *prima facie*. Schuhe, 70. See Commonwealth *v.* Charlestown, 18 Mass. (I Pick.) Rep. 180; Storer *v.* Freeman, 6 Mass. R. 435; Delaware and Maryland Railway Co. *v.* Stump, 8 Gill & J. (Md.) 479; Day *v.* Day, 4 Ind. 262. See also Angell on Watercourses, p. 70, 6th edit.

were covered by several fisheries appurtenant to or parcel of the manors on the banks; the case is the same with respect to the Trent, Witham, the Welland, the Nene, the Ouse, the Cam, the Aire, the Wavency, the Stour, the Colne, the Blackwater, the Crouch, the Thames on the coast of Essex, the Swale, the Christchurch Avon, the Exe, the Teign, the Dart, the Tamar, the Fal, the Severn, the Wye, the Dee, the Mersey, the Ribble, the Lune, the Eden, the Derwent, and the Solway Frith. If reference were made to the
909 grants and records relating to manors situate upon tidal rivers and estuaries there is no doubt that several fisheries would be found to be parcel of every one of them. With regard to fisheries upon the open sea-coast it is clear that they existed from the earliest time. Magna Carta, c. 23, which orders all kiddels to be destroyed throughout England, especially excepts those *per costeram maris;* and Hale remarks that "this exception of weirs upon the sea-coast, and likewise frequent examples, make it appear that there might be such private interests, not only in point of liberty, but in point of propriety, on the sea-coast and below the low-water mark, for such were regularly all weirs." The records shew that these several fisheries existed all round the coast, the lords of the manors having weirs placed upon the foreshore wherever the shore was suitable for that kind of fishery; kiddel fishing was universal throughout the open shore of the county of Essex. The Quo Warranto Rolls and the Hundred Rolls shew numerous instances of such fisheries in the counties of York, Lincoln, Norfolk, Suffolk, Kent, and elsewhere; the entries relating to them have not been set out in the previous treatise, but several have been incidentally noted (see pp. 48, 49, 50, 52, 53, 54, 55, 57, 58, 59, 60, 64, 65, 79, 88, 89, 102, 103, 104, 109, 145, 146, 153, 154, 156, 160, 163, 164, 167); in fact, there

is practically no doubt that the whole foreshore of the kingdom wherever it was fit for fishing by weirs was covered by several fisheries. With regard to non-tidal waters there is no doubt whatever that in ancient times the whole of them were embraced in several fisheries as parcel of the manors which either abutted on or included the rivers.

The following very imperfect list refers to places in which fisheries are shewn to have existed from notes of records in the Editor's collection. The list might be amplified if the inquisitions and extents of manors were inspected, the calendars of these documents not giving particulars as to fisheries. The Editor is fully conscious that this list is very imperfect, but it is here printed to shew that Mr. Hall's suggestion as to fisheries – *viz.*, that they are rare and infrequent in the hands of a subject – is as unfounded as his assumption that the foreshore had only been granted but in very exceptional cases.

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Maine *et al.* Ex. No. 729

Moore, Stuart A., *The History and Law of Fisheries*, pp. xxxviii-xliii, 2-7, 12-14, 19-27, 32-36, 95-108, 178-87, 191-92, 199-202, 227-31, 284-85, 294-97, 374-77 (1903).

* * *

xlii In whatever way the right to create several fisheries in tidal waters arose, it is clear that in early times before the reign of Henry II, the power was extensively exercised, and several fisheries which are now in existence almost completely cover the whole of the tidal estuaries and many parts of the coasts of the kingdom. Textwriters deriving their knowledge only from decided and reported cases have

considered that these fisheries so granted were exceptional and few in number. This is a fallacy, for it can be shown by records that they existed in almost every piece of tidal water round the coasts which was naturally available for the
xliii profitable exercise of an exclusive fishery. Numerous several fisheries in tidal waters were in existence before the date of Domesday, and in non-tidal waters the fisheries appear to have been all appropriated to the lords of the manors.

* * *

35 1. EXCLUSIVE FISHERIES are those in which one has the sole and exclusive right of fishing, either by reason of the ownership of the soil and its profits, or because the right of fishing is derived from the owner of the soil. These fisheries, in both tidal and non tidal waters, are sometimes described as "several" and sometimes as "free."

Exclusive fisheries may be of two kinds – corporeal or incorporeal.

Corporeal, or, as they have been termed, *territorial* fisheries, comprise both the soil and the profit of the soil, *viz.*, the fishing. Such are – (a) fisheries worked by fixed engines, as weirs, kiddles, stake nets, bucks, &c.; (b) fisheries in the hands of the lords of manors of which they were originally parcel, or in the hands of grantees of the lords of manors when they have been granted out as entire fisheries comprising the soil and the fishing; (c) fisheries in gross granted by the Crown to monasteries, corporations, &c. Corporeal fisheries may be held in gross, or by copy of Court roll, or as parcel of a manor.

Incorporeal fisheries are those which have been granted without the soil thereunder. These may have been created

by grant of the Crown in the nature of a franchise (if any such exist), or by grants by the lords of manors or owners of the soil and fishing thereon, with a reservation of the soil to the grantors. Incorporeal fisheries may be held either in gross or as appurtenant to a manor or particular tenement.

* * *

178 In 1571 is the first instance of the protection of fishing-nets at sea (the statute 13 Eliz. c. 11). The Act enacts that, "for the avoyding of the lewde outrages commytted and done upon the sea coasts of Norfolk and Suffolk by the Catches, Mongers, and Picardes pretending to buy fresh herrings, and which do cut in sunder dyvers peeces of Fyshermen's news traveling the High Seas to take fresh Herrings, to the utter undoing of the said poore Fishermen." It was therefore enacted that "no ships, boats, or vessel called Catch, Monger, and Picarde" shall, between 14th September and 14th November, from sunset to sunrise, ancker on the mayne sea or in the Common Streame or Trade of fyshing where the fishermen use to dryve, upon pain of forfeiture of their ship and tackle, or the value thereof. Half the value is to be the King's, and half is to go to the bailiffs of Yarmouth to recompense the parties whose nets were cut and for the repair of the haven there.

In 1603 was passed the Act 1 James I. c. 23, relating to the Cornish pilchard fishery. This Act is still in force, and is printed hereafter.

In 1605 was passed the Act of 3 James I. c. 12, for the better preservation of sea fish. The preamble is interesting, as showing the view then taken as to the propagation of sea fish: "Forasmuch as it is certainly known by daily experience that the Brood of Sea fish is spawned and lieth in still waters, where it may have rest to receive

nourishment and grow to Perfection, and that it is there destroyed by Wears, Draw-nets, and nets with Canvas, or like engines, in the Middle or Bosom of them, in Harbours, Havens and Creeks within this Realm, to the great damage and Hurt of Fishermen and hindrance of the Commonwealth; for that every Wear near the Main Sea, taketh in Twelve Hours sometimes the quantity of Five Bushels, sometimes Ten, sometimes Twenty or Thirty Bushels of the Brood of Sea fish: and also those which use Draw-nets, nets with Canvas, or Engines in the midst of them, do every day they fish destroy the Brood of all the sorts of fish
179 aforesaid in great multitudes." It was therefore enacted that no one should set up any new wears along the Sea Shore, or in any Haven, Harbour, or Creek within five miles of the Mouth of any Haven or Creek, or should willingly take, destroy, or spoil any spawn, fry, or brood of any sea fish in any wear or other device; and no one was to fish within the above limits with any Draw-net or Drag-net with meshes of less than one and a half inches from knot to knot, except for taking Smoulds in Norfolk, or with any net with canvas or other device by which fry might be destroyed."

The Act was not to apply to nets for herrings, pilchards, sprats, or lavidnian, or to the Isle of Anglesey.

In 1662 the Act of 14 Charles II. c. 28, forbade the use of drift-nets, trammels, or stream-nets within a league and a half of the coast of Cornwall and Devon from the 1st June to the 30th November. This was solely for the protection of the pilchard Seine-net fishery. The Act also made it a penal offence to purloin pilchards from nets, boats, or cellars.

In 1670 was passed the Act of 22 & 23 Charles II. c. 25(e), entitled An Act for the better preservation of the game, and for securing warrens not inclosed, and the several fishings of this realm. It forbade any one to take fish without the consent of the owner in any river, stew-pond, mote, or other water. This was followed by more stringent measures in 1692. In that year the Act of 4 & 5 Will. & Mary, c. 23, forbade every person who was not the owner or occupier of a fishery for the time being to keep nets, rods, or other fishing implements. This was not to apply to the makers and sellers of such implements, nor to any fisherman or his apprentice lawfully authorised to fish in navigable rivers or waters with lawful nets and engines; but every one of them might (according to the laws and orders made and to be made or settled for the good order, rule and government of such navigable rivers and waters), use the trade of fishing.

In 1699 the Act for making Billingsgate a market for fish (10 & 11 Will. III. c. 24) prohibited the landing of lobsters that were not eight inches in length from the peak of the nose to the middle fin of the tail.

In 1714 the Act of 1 Geo. I. st. 2, c. 18, enacts that, as the breed and fry of sea fish has been of late years greatly prejudiced and destroyed by the using of too small size or mesh, and by other illegal and unwarrantable practices, no one shall use at sea, upon the coast of England, any trawl-net, drag-net, or set-net for catching any kind of fish except herrings, pilchards, sprats, or lavidnian, which has any mesh of less size than three and a half inches
180 from knot to knot, or which has any false or double

bottom, cod, or pouch. The Act also specifies the sizes of fish that may not be sold.

* * *

181 In 1771 was passed the Act of 11 Geo. III. c. 31, relating to herrings. Sections 11-13 are still in force.

In 1791 the Act of 31 Geo. III. c. 51, entitled An Act for better protecting of the several Oyster Fisheries within this Kingdom, was passed. It recites: "Whereas the maintaining and preserving the several oyster fisheries of this kingdom is a great national object, and whereas the laws now in being are not sufficient effectually to maintain and preserve the said fisheries and to prevent the destroying of the oyster brood." It therefore made it a misdemeanour for any person, not lawfully entitled, to fish with or use any net, trawl, dredge, or other instrument within the limits of any oyster fishery. This provision was not to apply to persons fishing for floating fish in the waters or creeks within the limits of any oyster fishery with any net adapted for catching floating fish only.

This Act was added to in 1808 by the Act 48 Geo. III. c. 144, which made it a felony to wilfully steal, take and carry away oysters or oyster brood, from any oyster bed or oyster laying, or oyster fishery, being the property of any person or body politic or corporate, and sufficiently marked out as such.

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227

APPENDIX.

STATUTES.

[Note.—*The black figures in the margin indicate the pages on which the particular section is referred to.*]

9 HEN. III. MAGNA CHARTA. A.D. 1224.

C.16. – Nulla riparia decetero defendatur nisi ille que fuerunt in defenso tempore Regis Henrici avi nostri per cadem loca et cosdem terminos sicut esse consueverunt tempore suo.

No banks (rivers) shall be defended from henceforth but such as were in defence in the time of King Henry our grandfather, by the same places and the same bounds as they were wont to be in his time.

C.26. – Omnes kidelli decetero deponantur penitus per Tamisiam et Mede weyam et per totam Angliam nisi per costeram maris.

All weirs from henceforth shall be utterly put down through Thames and Medway, and through all England, except by the sea-coasts.

17 EDW. II., STAT. 1, c. 11.

Item habet warectum maris per totum regnum; wallenas et sturgiones captos in mari vel alibi infra regnum, exceptis quibusdam locis privilegiatis per Regis.

Also the King shall have wreck of the sea throughout the realm; whales and sturgeons taken in the sea or elsewhere within the realm, except in certain places privileged by the King.

* * *

229 11 GEO. III. c. 31.

An Act for the Encouragement of the White Herring Fishery. [1771.]

WHEREAS the carrying on and improvement of the British White Herring Fisheries are of great importance to these kingdoms, by increasing the trade and navigation thereof, and being a nursery for seamen, and otherwise a means of employing and providing for great numbers of industrious poor, provided that reasonable encouragement be given to such persons as are willing to carry on the said Fisheries: . . .

1-10. [Repealed by 31 & 32 Vict. c. 45.]

11. And . . . all and every person or persons employed in the said Fisheries may fish in any part of the British seas, and shall have and exercise the free use of all ports, harbours, shores and forelands in Great Britain, or the islands belonging to the Crown of Great Britain, below the highest high-water mark, ...

* * *

Maine *et al.* Ex. No. 730

New Plymouth Colony, *Records* (Nathaniel B. Shurtleff ed.), Vol. V. *Court Orders:* 1668-1678, pp. 62-63, 104, 244-45 (1856).

* * *

63 In answare unto the petition perfered to this Court by Mr. John Prince and Mr. Nathaniel Bosworth, of the towne of Hull, allies Nantaskett, in the behalfe of the said towne, to have libertie to imploy some boates and theire companies for the takeing of mackerell with netts, att the season thereof, att Cape Codd, this Court doth graunt unto them libertie fo two boates and there companies, to take mackerell there att the season thereof; soe as they make payment of what is due to the collonie from forraigners, nothwithstanding any order of Court extant, prohibiting others to fish there. [1671].

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104 An Order directed to Thomas Paine, the Water Bayley.

This Court being enformed that few or none of ours are like to fish att the Cape by saine, and that divers strangers desire libertie there to fish, these are therfore to impower you, in the behalfe of the Court, to give libertie to such strangers as shall desire there to fish, carrying orderly and paying such dues as by Court order is provided; and this shalbe youer warrant therin for this p̃sent season. [1672].

* * *

244 The country have sett and to farme lett theire privilidges and proffitts of fishing att the cape unto the Treasurer, Mr. Huckens, Mr. Gray, and Thomas Paine, for the terme of seven yeers from the date hereof, for and in consideration of the sume of thirty pounds a yeer, to be payed in currant silver mony, to be payed att or before the first of May yeerly. It is mutually agreed between the Court and the p̃tenors, that it shalbe improved by our

owne people, but incase they shall refuse, that then it shalbe att the libertie of the p̃tenors to admitt of any other, out of the collonie, to improve it with them; and the Court appoint Cornett Studson and Mr. Nathaniel Thomas to make leasses to the p̃tenors, and to receive the countryes mony for it, for the countryes use, as it is due and payable.

244 To the intent that the townes of this govrment might have seasonable notice of the p̃mises, order was given by the Generall Court to the deputies of the severall townes of this jurisdiction, to acquaint theire townes that such as will fish att Cape Codd for mackerell, &c., should appeer att Plymouth, when the comittee appointed to settle the countryes debts should meet, which is to be on the second Tusday in August next after the date heerof, att which time those whoe have hiered the fishing there of the country wilbe p̃sent, to agree with them. [1677].

The fift of June, 1678. That the farmers of the fishing
245 att Cape Cod, and other privilidges there, according to theire indentures, may be secured from mollestation in what is leased out to them, it is ordered by this Court, that whosoever shall attempt to gett fish there without order, or otherwise molest such as are orderly by the farmers imployed there, any sayne heared out by intruders to gett fish there, and the fish by them soe taken, and any vessel, goods, or estate of any other kind shalbe seized for the collonies use, out of which all damage done there by such molesters, with all charge that may arise therby, shalbe fully payed, and such seizures to be made by vertue of warrant from the Govr or some one of the Assistants.

June, 1678. It is ordered by the Court, that it shalbe in the libertie of the leassers of the privilidges of the cape

fishing, to admitt of the one halfe of the improvers therof to be off any of the collonie of the Massachusetts, as they may see reason.

* * *

Maine *et al.* Ex. No. 731.

New Plymouth Colony, *Records* (Nathaniel B. Shurtleff ed.), Vol. VI. *Court Orders: 1678-1691*, pp. 18, 56, 102-03, 252-53, 31, 81, 132, 139-40, 218-19 (1856).

* * *

252 *At a Generall Court holden at Plimouth November 4th, 1690.*

* * *

ORDERED, that for the prevention of contests and suits by whale killers, –

1. This Court doth order, that all whales killed or wounded by any man & left at sea, sd whale killers that killed or wounded sd whale shall presently repaire to some prudent person whome the Court shall appoint, and there give in the wounds of sd whale, the time & place when & where killed or wounded; and sd person so appointed shall presently comitt it to record, and his record shall be allowed good testimony in law.

* * *

3. That whatever person or persons shall cut up or deface any whale fish, by cutting, stabbing, or launcing, after come on shore or at sea, if a drift, unless of necessity to towe it to shore, before it hath been viewed by the

person appointed thereto, and a record taken by him, shall
253 lose their right to said fish, & pay a fine of ten pounds to the county. And sd viewers shall seize sd fish for the owners use, or the effects thereof, and sd viewer shall have power to make a deputy or deputies under his hand, and to have six shillings for [each] whale so viewed & recorded of the owners thereof.

4. That whosoever finds, takes, or cuts up any drift whale found on the stream, a mile from the shore, not appearing to be killed by any man, shall be the x first sieze and secure them, paying an hogshead of oyle to ye county for every such whale.

* * *

139 *Att the Generall Court held att New Plymouth, July the fourth, 1684.*

Mr. William Clarke, of Plymouth, came into the Court and tendered, that if this Court would make a law to prohibitt the catching of mackerell with saines in any p̃te of this collonie, hee would and did engage to the Court that hee would give and pay unto the Treasurer thirty pound pr annum, for seaven yeares, in currant New England mony, for the basse fishing att Cape Codd; wherupon this Court passed an order to prohibit sayning for mackerell, and ordered the Treasurer to make a lease to the said Clark of Cape Codd, onely for basse fishing, seaven yeer, for the said sum of 30£ per annum.

* * *

140 This Court takeing into theire serious consideration the great damage that this collonie and our naighbours is likely

to sustaine by the catching of mackerell with netts and saines att Cape Codd, or else where neare any shore in his collonie, to the great destruction of fish, and to the discurragement of severall fishermen, –

This Court doth therfore enacte, and be it heerby enacted, by the authoritie therof, that noe pson or psons whatsoever, after the publication heerof, shall catch or draw on shore any mackerell, with nett or netts, sayne or saines, in any p̃te of this collonie; and if any pson or psons shall heerafter presume to catch any mackerell by setting or shooling any nett or sayne, every such pson or psons soe offending as aforsaid shall forfeite for his or theire said offence all such netts or saynes as shalbe soe improved, and all such mackerell as shalbe soe caught by him or them, and shall alsoe forfeite every such vessell, and all such vessells, or boates, as shalbe imployed therin, whether catch, sloop, or boat, as shalbe imployed in taking or carrying away any such fish, if att any time the pson or psons soe offending be taken within the govment, or the vallue therof, the one moiety to the collonie, and the other moyety to the informer, that shall procecute the same. . . . [1684].

* * *

Maine *et al.* Ex. No. 732

New Plymouth Colony, *Records* (David Pulsifer ed.), Vol. 11, *Laws: 1623-1682*, pp. 134, 220, 228-29, 233 (1861).

* * *

220 Wheras great Complaint is made of great abuse by reason of ffishermen that are strangers who ffishing on some of the ffishing ground on our Coast in Catches dresing and

splitting theire ffish aboard through theire Garbidg overboard to the great anoyance of ffish which hath and may prove greatly detrementall to the Countrey; It is ordered by the Court that somthing be directed from this Court to the Court of the Massachusetts to request them to take some effectuall course for the restraint of such abuse as much as may bee; . . . . [1668].

* * *

228 Wheras the Providence of God hath made Cape Code comodious for us for ffishing with saines; and some careles psons have anoyed the same by casting theire ballast neare the shore where such conveniency is; or by leaveing the Garbidge of ffish or dead ffish to lye there roting wherby such anoyance is; This Court doth therfore order that whosoever shall treaspas in any of the said kinds of Annoyance shall pay the sume of forty shillings to the Collonies use for every such default unto the pson that the Court doth appoint to looke after the same; alsoe this Court doth further order that whosoever of our Inhabitants that draw Mackerell on shore there; shall pay to the Collonies use sixpence p barrell for every barrell soe taken or the quantity that may amount to a barrell: and for every barrell or the quantitie therof soe taken by any fforaigners in the aforsaid place shalbe payed one shilling and sixpence to the Collonies use by the pson or psons that soe ffish there and att the begining of any voyage attempted there; the pson or psons soe doeing shall att the enterance on the voyage put in sufficient Cecuritie unto the pson appointed by the Court under this trust for the payment of the aforsaid sume or sumes; . . . . [1670].

* * *

Wheras wee have formerly seen Great Inconvenience of taking Makerell att unseasonable times wherby there encrease is greatly deminished and that it hath bine proposed to the Court of the Massachusetts that some course
229 might be taken for preventing the same and that they have lately drawne up an order about the same this Court doth enacte and order that henceforth noe makerell shalbe caught except for spending while fresh before the first of July. Annually on penaltie of the losse of the same the one halfe ot the Informer and the other halfe to the use of the Collonie; and this order to take place from the 20th of this Instant June;

* * *

233 It is enacted by the Court that the one halfe of the Excise due to the Country on the Mackerell to be caugt att the Cape bee henceforth abated: *viz:* that wheras it was twelve pence a barrell to our owne it shall henceforth be but sixpence a barrell from our owne and wheras it was formerly two shillings a barrell to fforraignors it shall henceforth be but twelve pence a barrell to fforraignrs; except any shall come in before the next Court and rent the said privilidge of Cape ffishing; . . . [1673].

Maine *et al.* Ex. No. 734

Osgood, Herbert L., *The American Colonies in the Seventeenth Century*, Vol. 1, *The Chartered Colonies*, pp. 98-102, 376-79 (1904).

* * *

478 Interest attaches to the experiment of Plymouth with a government monopoly in the mackerel fishery at Cape Cod, and also to the enforcement of its royalty over drift whales.

In 1646, when the excise was first enacted, a license fee was imposed on fishing at the Cape. In 1661 the rate for non-residents was fixed at 6*d.* per quintal. In 1670 inhabitants of the colony were required to pay 6*d.* per barrel for mackerel brought to shore there, and strangers, 1*s.* 6*d.* per barrel. A water bailiff was specially appointed to collect the impost and enforce the act. In 1677 the colony leased its privileges in this fishery for seven years at £30 per year. In 1684 the treasurer was ordered to lease the fishery for another period of years; and it was leased, though the con-
479 contract was broken by the lessor before the period had elapsed. For a time the trade to the Kennebec river seems also to have been leased by the colony, but the revenue from that source was temporary and very slight.

* * *

Maine *et al.* Ex. No. 739

Potter, Pitman B., *The Feedom of the Seas in History, Law, and Politics,* pp. 36-37, 48-81 (1924).

* * *

36 With the breaking of Roman power, the Mediterranean states which had exercised maritime dominion in previous years regained control over certain maritime areas near their territories. Pisa and Tuscany once more controlled
37 the Tyrrhenian Sea, and imposed tolls upon those entering its waters. The Genoese did likewise in the Ligurian Gulf. Venice – somewhat later – acquired a dominion of the Adriatic which was variously described by contemporary writers, as a "seignory," a "royalty," an "empire," and so on. It was said that they possessed "as full a jurisdiction

in the sea as in the city," that the neighboring gulf "belonged" to them. In various terms their lordship was described by many commentators, and Venice became a second Athens in her day, her maritime authority being admitted at one time or another even by Spain and the Empire.

* * *

Maine *et al.* Ex. No. 742

Sabine, Lorenzo, *Report on the Principal Fisheries of the American Seas,* S. Doc. No. 22, 32d Cong., 2d Sess., pp. 181, 184-91, 196-210, 214-15, 227, 269-89, 293-95, 303, 315-24, 354-55 (Jan. 15, 1853).

* * *

185 Sagacious men in New England had now seen for years that the expulsion of the French was the only measure that would secure peace in the prosecution of the fisheries, and they endeavored to enlist the sympathy and co-operation of the mother country. The war between France and England which followed the accession of William and Mary was no sooner proclaimed at Boston than the general court of
186 Massachusetts commenced preparations for the conquest of Nova Scotia and Canada. Sir William Phips, who was born and bred among the fishermen of Maine, was intrusted with the command of an expedition against both. He reduced the first, and established a government; but his enterprise in the St. Lawrence was disastrous. It is of interest to add, that the first paper money emitted in America was issued by Massachusetts to defray the expenses of these military operations.

At the peace of Ryswick, in 1697, it was stipulated that mutual restitution should be made of all conquests during the war; and, much to the dissatisfaction of the English colonists, Nova Scotia returned once more to the undisputed possession of the French. The strife in America had been avowedly for the fisheries, and for territory north and west; and this treaty, which, with the exception of the eastern half of Newfoundland, secured to France the whole coasts, the islands, and the fishing-grounds from Maine to beyond Labrador and Hudson's Bay, besides Canada and the valley of the Mississippi, was regarded as dishonorable to England and wantonly injurious to colonial industry and peace.

The evil consequences of the treaty of Ryswick were soon manifest. A year had not elapsed before the French government promulgated a claim to the sole ownership of the fisheries. In 1698, a frigate bound from France to Nova Scotia furnished the master of a Massachusetts vessel with a translated order from the king, which authorized the seizure of all vessels not of the French flag that should be found fishing on the coast. General publicity of the order followed, and its execution was rigidly enforced. Bonaventure, in the ship-of-war Enviux boarded and sent home every English colonial vessel that appeared on his cruising-ground; while Villabon, governor of Nova Scotia, in an official despatch to the executive of Massachusetts, declared that instructions from his royal master demanded of him the seizure of every American fisherman that ventured *east of the Kennebeck river, in Maine.* The claim was monstrous. If I understand its extent, the only fisheries which were to be open and free to vessels of the English flag were those westerly from the Kennebeck to Cape Cod, and those of the western half of Newfoundland. It seems never to have occurred to a single French statesman that the supply of fish in our seas is inexhaustible,

and that, reserving certain and sufficient coasts for the exclusive use of their own people, other coasts might have been secured to their rivals, without injury to any, and with advantage to all. In fact, evidence that such a plan was suggested by our fathers, or by the ministry "at home," does not, I think, exist. On both sides the strife was for the monopoly and for the mastery.

Richard, Earl Bellamont, arrived in Boston in 1699, and, having assumed the administration of affairs in Massachusetts, pointedly referred to these pretensions in a speech to the general court, and to the execrable treachery of the Stuart who had parted last with Nova Scotia and "the
187 noble fishery on its coast." But his lordship could afford no redress.

In the first year of the reign of Queen Anne, the two nations were again involved in war. Among its causes was the claim of France to a part of Maine and to the whole of the fishing-grounds. The people of New England, driven from the Acadian seas by the common enemy, needed no solicitation from the mother country to engage heartily in the contest. On the other hand, employing armed vessels of their own, they were hardly restrained, in their zeal and success, from hanging as common pirates some of the French officers who had been the instruments of interrupting their pursuits in the forbidden waters.

Nor was this all. They attempted the conquest of Nova Scotia, and equipped a fleet at Boston. The enterprise failed. Promised ships from England three years later, but disappointed, a second expedition failed also.

At last, in 1710, Nova Scotia became an English colony. Its reduction was a duty assumed by the ministry, while, in truth, it was accomplished principally by colonists and

colonial resources. Of the force assembled at Boston, six ships and a corps of marines were, indeed, sent from England; but the remainder, thirty vessels and four regiments, were furnished by the four northern colonies. Strange it was that Anne, the last of her family who occupied the throne, should have permanently annexed to the English crown the colony and the "noble fishery" which all of her line had sported with so freely and so disastrously.

* * *

199 In 1778, the project was renewed. In the instructions to Franklin, he was directed to urge upon the French court the certainty of ruining the British fisheries on the Banks of Newfoundland, and consequently the British marine, by reducing Halifax and Quebec. Accompanying his instructions was a plan for capturing these places, in which the benefits of their acquisition to France and the United States were distinctly pointed out. They were of importance to France, it was said, because "the fishery of Newfoundland is justly considered the basis of a good marine;" and because "the possession of these two places necessarily secures to the party and their friends the island and fisheries." Among the benefits to the United States would be the acquisition of "two States to the Union," and the securing of the fisheries jointly with France, "to the total exclusion of Great Britain."

* * *

214 In 1583 Sir Humphrey Gilbert, under the first charter that passed the great seal of England for colonization in America, arrived at Newfoundland. He found thirty-six vessels in the harbor of St. John of different nations, and

was refused entrance; but on hearing that he had a commission from Queen Elizabeth, they submitted.

He took possession of the island with great pomp and ceremony, and granted lands and privileges to fishermen in fee, on condition of the payment of quit-rent. It is important to remark that the right of England to Newfoundland and its fishing-grounds rests on the discovery of Cabot, in 1497, and on the possession of Gilbert at this time.

* * *

Assuming full title to the island and the fisheries, the Eng-
215 lish seem, for the moment, to have attempted to exclude the vessels of other nations, or, at least, to have compelled an acknowledgment of subjection to them as vested with proprietary rights. We find that, in 1585, a fleet of ships under Sir Bernard Drake made prizes of several vessels laden with fish and furs, which he sent to England.

* * *

274 . . . . And to settle the question, we may refer to "A brief Narrative of the *true* grounds and causes of the first planting of New England," by Edward Winslow, one of the most distinguished of their number, and who succeeded Bradford as their governor. No original copy of this tract is supposed to be in America; but a few years since the Rev. Mr. Ellis, of Charlestown, found one in a printed volume in the British museum, copied it for the Rev. Dr. Young, who has placed it in the "Chronicles of the Pilgrims."

Winslow, in this narrative, speaks of an interview between King James and the agents of the Puritans who went over to England from Leyden in 1618 to solicit his consent to their going to America. The monarch asked them, "What profit might arise?" He was answered in a single word – "Fishing." Whereupon James replied: "So God have my soul, 'tis an honest trade; 'twas the Apostle's own calling."

Can anything be more conclusive?

* * *

278 The [Plymouth Colony] fisheries, I conclude, were considered public property, and were generally leased to individuals for the benefit of the colony, or of particular towns. The subject of "rents" and of "profits" is continually referred to in the records, and orders to grant leases to petitioners, or to protect lessees in the enjoyment of the privileges stipulated in the covenants with them, are of frequent occurrence. An ordinance of the latter description of extreme severity was passed in 1678 – the court directing that all fishing vessels not belonging to the colony should be seized for public use by warrant from the governor, or one of his assistants, and that the lessees of the colony fisheries should be entitled to damages, to be paid them out of the proceeds of the vessels seized and confiscated. The people of Massachusetts were alone exempted from the penalties of this extreme measure.

* * *

282 In 1631, Aldsworth and Eldridge, two merchants of Bristol, England, obtained a grant known as the "Pemaquid patent," which gave them the exclusive right to fish in their own waters.

The patent embraced several thousand acres of land on the main, the Damariscove islands, and all other islands within nine leagues of the shore; and thus, whether designedly or otherwise, included Monhegan. The whole territory, though now almost in the centre of the seacoast of Maine, was east of Gorges' eastern boundary, and therefore within the French claim. It would seem that a fishery was established at Richman's, or Richmond's Isle, near Portland, previous to 1631; since, in that year Prince records, in his annals, that Governor Winthrop was informed of the murder there of Walter Bagnall and another person, by "Squidecasset," an Indian sachem; which isle, says Prince, was part of a tract of land granted to Mr. Trelan, a merchant of Plymouth, England, who had "settled a place for fishing, built a ship, and improved many servants for fishing and planting." . . . .

* * *

354 THE MACKEREL FISHERY.

From the settlement of New England to the year 1852.

It is frequently said that the mackerel fishery is of very recent origin, or that, at least, *vessels* were not employed in it until about the close of the last or the beginning of the present century. Both suppositions are entirely erroneous. The Indians, regardless of the beautiful form and color of the fish, called it wauwunnekeseag, on account of its fatness. There is mention of it in the earliest records of the country. Winthrop relates that, in 1633, the ship Griffin, two days before her arrival at Boston, lost a passenger by drowning, as he was casting forth a line to catch mackerel. The first settlers must have commenced the fishery soon after, since – to omit several minor incidents – we have the fact that Allerton, one of

the Pilgrims who came over in the Mayflower, received mackerel for sale at New Haven, on "half profits," in the year 1653. That the business was prosecuted with success is evident from the additional fact, that in 1660 the commissioners of the colonies of New England recommended to the general courts of the confederacy to regulate it, "considering" that "the fish is the most staple com-
355 modity of this country." The mackerel fishery at Cape Code was held by the government of the colony of Plymouth as public property, and its profits were appropriated to public uses. The records show that it was rented, from time to time, to individuals, who paid stipulated sums, and that a *part of the fund to support the first free-school established by our Pilgrim fathers was derived from it.*

The proposition to found and endow a school of this description seems to have been made in 1663, but not to have been adopted until seven years later, when the general court, "upon due and serious consideration, did freely give and grant all such profits as might or should annually accrue to the colony," from this and the bass and herring fisheries, at the same place. In 1689, the "rent of the Cape fishery was added to the appropriation for magistrates' salary for that year."

Exact statements as to the progress and extent of the mackerel fishery previous to the Revolution, are hardly to be found; but it is still certain that the people of Rhode Island and Connecticut, as well as those of Massachusetts, were "largely concerned in it," and that fleets of sloops employed in it were often seen upon the coast and in the harbors. It is certain, also, that about the year 1770, the town of Scituate, alone, owned upwards of thirty vessels that were annually fitted out as "mackerel catchers;" and

that the whole number of vessels in Massachusetts was not less than one hundred. Soon after the peace of 1783, a writer in a Boston newspaper, in a series of articles on American commerce, said that the mackerel fishery "was of more value to Massachusetts than would be the pearl fisheries of Ceylon."

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Maine *et al.* Ex. No. 743

Schultes, Henry, *An Essay on Aquatic Rights; Intended as an Illustration of the Law relative to Fishing*, pp. 2-4 (1811).

* * *

3 This general immunity must be understood to be confined to that people, within whose territorial boundaries such rivers or seas were contained; for, although by the law of nature the sea is open to all mankind, the right of fishing in ports and rivers could never have been considered, or intended to be admitted, as an universal right. Nor could a foreign power send vessels to navigate within the limits of such maritime districts, or take fresh running water on the shore without permission expressed or implied. Neither can the interests of maritime states admit a promiscuous liberty to strangers to fish or navigate within their seas, since it might affect both their personal security and personal sustenation. Their personal security would be endangered, by the facility afforded to foreign powers to make inimical incursions upon them; and their

food might be lessened by the exhaustion of their fisheries. For, though fishing is abundant in the sea, it is manifest that it may, in part, be exhausted, especially if all nations should desire such a right and liberty near the coasts of any particular country; and, as it is very usual that some particular kind of fish, or, perhaps, some more
4 precious commodity, as pearls, coral, amber, or the like, are to be found only in one part of the sea, and that of no considerable extent, the congregation of many people to that part must necessarily prejudice the people of the neighbouring shore. In this case, then, there is no reason why the borderers should not rather challenge to themselves this happiness of a wealthy shore or sea, than those who are seated at a distance from it. And according to Bodinus, by a kind of common right enjoyed by all princes of maritime countries, the particular sovereign may command and control those who approach within sixty miles of his shore.

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Maine *et al.* Ex. No. 747

Smith, Herbert Arthur, *Great Britain and the Law of Nations*, Vol. II-Territory (Part I), pp. 113, 137-44, 204-05 (1935).

* * *

138 The enactment of this statute was the result of the decision of the Court for Crown Cases Reserved in the celebrated case of *R. v. Keyn*, decided in 1876. The case arose out of a collision between a German and a British ship two miles from Dover pier, a passenger in

the British ship being drowned as a result of the accident. Keyn, the commanding officer of the German vessel, the *Franconia*, was indicted and convicted for manslaughter at the Central Criminal Court. By a bare majority of seven judges to six the appellate tribunal held that the conviction could not be sustained.

Technically the opinion of the majority amounted to no more than a decision that the jurisdiction asserted by the Crown was not conferred by any existing English statute, and therefore it is not strictly a decision upon the broader question of international law. Of the seven judges composing the majority five were of opinion that it was competent for Parliament, without violating the law of nations, to confer such jurisdiction, if it saw fit to do so. In other words, eleven out of the thirteen judges were agreed that territorial waters were within the sovereignty of the riparian state, and of these eleven six held that the existing pro-
139 visions of the English criminal law conferred sufficient jurisdiction to punish the offence in question.

It is unnecessary here to recapitulate in detail the earlier material which was exhaustively examined in the various judgments delivered. It was beyond dispute that in numerous instances Parliament had enacted statutes affecting both British and foreign vessels within territorial waters. None of these statutes expressly conferred the criminal jurisdiction claimed by the Crown in the case before the Court, and the minority differed from the majority chiefly in holding that the jurisdiction was conferred by the common law. Only two judges (Chief Baron Kelly and Sir Robert Phillimore) were of opinion that a statute conferring such jurisdiction would exceed the rights given to the riparian state by the law of nations. We may therefore take it as clear that in 1876 the great preponderance of judicial opin-

ion in England was in favour of the view, now re-affirmed in the British memorandum, that "the rights which States possess over their territorial waters are rights of sovereignty".

The decision occasioned considerable surprise, and the Act of 1878 was enacted to remove all doubts upon the attitude of Great Britain towards the question. In introducing the bill in the House of Lords the Lord Chancellor (Lord Cairns) gave expression to the general feeling of surprise and apprehension which had been evoked, and his predecessor, Lord Selborne, spoke in the same sense. Lord Cairns further pointed out that in 1848 a warrant issued under the provisions of the Customs Regulation Act, which had not been cited to the court, extended the limits of the port of Dover to the three-mile limit, thus including the place where the collision occurred.

Before this case came up it does not appear that the general question of sovereignty in territorial waters was ever presented in a form calling for judicial or executive decision. But there is abundant incidental evidence to the
140 effect that expert opinion in this country considered the jurisdiction exercised in territorial waters to be based upon sovereignty. In the present volume the reader may refer to the language used on various occasions by the Law Officers, particularly to the opinions given in the course of the oyster fisheries dispute with France. In these opinions it is evidently assumed, rather than asserted, that the "territory" or "dominion" of Great Britain includes the zone of territorial waters, which are subject both to the common law and to the legislation of Parliament.

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Maine *et al.* Ex. No. 751

Stock, Leo Francis, *Proceedings and Debates of the British Parliaments respecting North America*, Vol. II, pp. 4, 352-53 (1927).

* * *

In 1685-1686, the Chevalier de Troyes, with about 80 men, subdued Moose Factory, Fort Rupert, and Albany, the three English forts that held the key to the Hudson Bay country (George Bryce, *The Remarkable History of the Hudson's Bay Company*, pp 50-52; Beckles Willson, *The Great Company*, 1900, I. 161-171; *Cal. St. P. Col.*, 1685-1688, pp. 366, 368, 388-390, 426, 658, 660-662). In the declaration of war, May 7, it was stated: "That it was not long since the French took licenses from the governor of Newfoundland to fish in the seas upon that coast, and paid a tribute for such licenses, as an acknowledgement of the sole right of the crown of England to that island; yet of late the encroachments of the French upon that island, and his Majesty's subjects trade and fishery, had been more like the invasions of an enemy, than becoming friends, who enjoyed the advantages of that trade only by permission. But that the French king should invade his Majesty's Charibbee Islands, and possess himself of the province of New York, and of Hudson's Bay, in a hostile manner, detaining some of his Majesty's subjects under the hardship of imprisonment, and causing others to be inhumanly killed, were actions not becoming even an enemy; and yet that he was so far from declaring himself so, that at that very time he was negotiating, here in England, by his ministers, a treaty of neutrality and good correspondence in America." Timberland, *The History and*

Proceedings of the House of Lords, I. 301; the date is erroneously given as May 4 (*cf. L. J.,* XIV, 203).

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Maine *et al.* Ex. No. 762

Wynne, William, *The Life of Sir Leoline Jenkins,* Vol. 1, pp. 85-99 (1724).

* * *

lxxxv *A Charge given at a Session of Admiralty within the Cinque Ports,* Sept. 2. 1668. *by* Dr. L. Jenkins.

Gentlemen of the Jury,

You are here empannelled and sworn to make a diligent Enquiry, and a true Presentment of all Crimes, Offences, and Abuses, that have been already committed, or are now prevailing within the Jurisdiction of the Admiralty of the Cinque Ports.

* * *

lxxxvi *First,* As to most of those Crimes and Offences that are enquirable, by the *Laws of the Realm,* I shall not need to say any more, but that *whatsoever is Treason* or Felony, Murther or Manslaugher, Mayhem, Riot, Larceny, or Misdemeanour, upon the main Land, within the Body of any County, the same changes not its Nature, Name, or Punishment, when 'tis committed upon the Sea, within the Jurisdiction of the Admiral.

* * *

And such was the Generosity of our ancient *English,* such the Abhorrence of our Laws against Pirates and Sea-

Rovers, that if any of the King's Subjects robb'd or murthered a Foreigner upon our Seas, or within our Ports,
lxxxvii though the Foreigner happened to be of a Nation in Hostility against the King, yet if he had the King's Passport, or the Lord Admiral's, the Offender was punished, not as a Felon only, but this Crime was made High Treason, in that great Prince *Henry* V. Time; and not only himself, but all his Accomplices, were to suffer as Traytors against the Crown and Dignity of the King.

* * *

The *Laws of Oleron,* are the ancient universally received Customs of the *Western* Part of the World; which *Rich.* I. of immortal Memory, being upon his Return from the Holy War, thought fit to review and reform; and then to give them the Stamp of his Royal Authority. These Laws all the Sea-faring Nations of this *Western* Part of the World, soon after received and entertained from the *English,* by way of Deference to the Soveraignty of our Kings in the *British* Ocean, and to the Judgment of our Countrymen in Sea-Affairs.

* * *

lxxxviii You are to enquire, whether any *Fishermen,* Subjects of the *French* King, do presume to fish upon this Coast, *without special License* from his Royal Highness; and if they have License, whether they fish with any other Nets than such as are of the *English* Size? The Offenders and their Boats are to be seized on, in any Port where they happen to come.

You are to enquire, whether any do *annoy your navigable Rivers,* or his Majesty's Ports, by throwing into them any Rubbish, Filth, or Ballast, or by taking up their Ballast in udue or improper Places; And after all *Regratters*

and *Forestallers* of the Market upon the Water; that is, such as do way-lay, and buy up any manner of Provision or Merchandise, before it be brought into the Port of Discharge; and do sell it again by Retail in the same Port, or within 4 Miles of it.

The Lord Warden, by vertue of his Office of Admiral, has a special Trust reposed in him, in Matters relating to War, and for the maintaining of his Majesty's Soveraignty in these Seas.

You are therefore to enquire, whether any Commander at Sea has, upon any Occasion, neglected to require and exact the just Respects, Deference, and Salutes, due to his *Majesty's Flag* from all Foreign Ships, and hath not fought, and, if need were, sunk such Ships as have refused that ancient Acknowledgment, which all Nations have Time out of Mind paid to the Banner of *England*.

If I should give you in Charge to enquire, if any Foreigners have refused to *strike* to *Dover-Castle*, and to salute it, (as I think I might do, without leading you out of the Jurisdiction of our Commission) every Stranger and Foreigner that hears me, would think the Enquiry very reasonable; because it hath been always usual, they know, to pay that Tribute of Respect, in lieu of the Safety and Protection every Ship is sure to find there.

* * *

xc *A Charge given at an Admiralty Sessions held at the* Old-Baily, *by Sir* L. Jenkins. *Taken by a good Hand.*

Gentlemen,

His Majesty's Commission, in virtue of which you have been summon'd, impannell'd, and sworn, being now read over, it is proper for you, in order to the better Discharge of your Trust, to be inform'd,

1. With the Nature and Scope of the Commission.

2. With the Extent and Limits of it, as it differs from Commissions of the same Name, before you take in Charge those particular Matters which are made enquirable by it.

* * *

Every *Englishman* knows, that his Majesty hath an undoubted Empire and Soveraignty in the Seas that environ these his Kingdoms, which by the ancient Statute Laws, are called the *quatuor Maria*, by Foreigners, and by our modern Treaties, the *British* Seas. And it is certain, that Empire or Soveraignty is precarious, nominal, or titular only, where the Soveraign doth not keep and maintain the Publick Peace. To keep the Peace, and to punish those that violate it, being the chief *Ensigne*, as well as the principal Business of all Empire and Government; 'tis this that gives his Majesty a Right, and indeed lays on him an indispensible Obligation, to keep the Publick Peace upon the Seas; that is, to preserve his Subjects and Allies in their Possessions and Properties upon these Seas, and in all Freedom and Security to pass to and fro on them, upon their lawful Occasions.

But besides these four Seas, which are the peculiar Care, and as it were, Part of the Domaine of the Crown of *England*, his Majesty hath a Concern and Authority (in Right of his *Imperial* Crown) to preserve the publick Peace, and to maintain the Freedom and Security of Navigation all the World over: So that not the utmost Bound of the *Atlantick* Ocean, not any Corner of the *Mediterranean*, nor any Part in the *South* or other Seas, but that if the Peace of God and the King be violated upon any of his Subjects, or upon his Allies or their Subjects, and the Offender be afterwards brought up or laid hold on in any of his Majesty's Ports, such Breach of the Peace is to be enquired of, and tryed in Vertue of a Commission of Oyer and Terminer, as this is, in such County, Liberty, or Place, as his Majesty shall please to direct. So long an Arm hath God, by the Laws, given to his Vicegerent the King; and so odious are the Crimes of *Piracy*, Bloodshed, Robbery, and other Violences upon the Sea, that Justice observes and reaches the Malefactors, even in the remotest Corners of the World, and Vengeance pursues them close at the Heels to their own Homes; where they seldom escape those Punishments they have deserved.

* * *

xci This Power and Jurisdiction which his Majesty hath at Sea in those remoter Parts of the World, is but in Concurrence with all other Soveraign Princes that have Ships and Subjects at Sea; and it is on this special Regard that *Pirates* are called *Hostes Humani Generis;* in that as they do give themselves the Liberty of making a Prey without Distinction of all Nations, and all manner of People; and do, as much as in them lies, hinder that mutual Amity and Supplies, which Providence hath ordained as the Means

to cherish and preserve that Humanity and Sociableness, which distinguishes not only Christians, but all Men, from Savages and Beasts of Prey; So all Nations and Soveraign Princes that meet with them, have a just and competent Authority to execute the Law upon them: And they are therefore esteemed to be out of the Protection of all Princes, and of all Laws; because every *Magistrate that bears the Sword for the Terror of those that do evil,* is to draw it against them; and is made a Minister to execute Justice upon them, whenever they can lay hold of them. . . .

* * *

xcv There is another Sort of Confederacy much more dangerous than all this, because it involves in it a publick Affront to the Crown and Dignity, to the Right and Soveraignty of the King, and also a publick Disgrace and Reproach to this Nation. It is, when Foreigners Privateers, or others, do confederate and refuse to give and allow to his Majesty, his ancient *Right of the Flag upon his four Seas;* or his undoubted *Right of Sanctuary* in his Ports, and other Places of Safety, commonly called the *King's Chambers;* or when they conspire to disallow his Right of safe Conduct to such Ships as his Majesty shall grant his Royal Letters of safe Conduct to pass these Seas in a Time of War, as this is. All these are direct Confederacies against the King, to usurp his Rights, and by degrees to incroach upon a Possession, the most constant, uninterrupted, and ancient, in the whole World.

You are therefore to enquire, if any Foreign Ship, Man of War, or other, being met with in any Part of the four *British* Seas, hath refused to *strike her Flag*, and *lower her Top-sail*, to any of his Majesty's Ships or Vessels,

carrying his Majesty's Flag, Ensign, or Jack. Or if any Captain or Commander of any Ship or Vessel, carrying the King's Flag, Jack, or Ensign, hath not demanded that Respect due to the King's Colours, when it was delayed, or refused, or not paid at the due Time, and after the accustomed Manner, and hath not pursued such Refusers as *Pirates.* Or if any Foreign Men of War have presumed to wear any of his *Majesty's Colours,* or the Colours of any Prince or Nation, saving their own, in these Seas. Which is ever the true Badge of a *Pirate,* and those that do it, are to be pursued as such.

The next Thing is, the *Right of Sanctuary* and *safe Conduct,* which the King hath Time out of Mind exercised, not only in his Harbours and Ports, but especially in his *Chambers;* that is, in those Tracts of Sea which are between some of the most eminent Promontories, or Points of Land (a straight imaginary Line being drawn between them); for instance between *Flamborough Head* and the *Sporn,* between the *North Foreland,* and the *South Foreland;* between *Portland* and the *Start;* between the *Land's End* and *Milford;* these Chambers being so reputed Time out of Mind, and so return'd in the Year 1604; (about 70 Years ago) by Jurors upon their Oath, to the Court of Admiralty.

You are therefore to enquire, if any Men of War under Foreign Commissions, from any of the Parties now in War, do lie hovering near any of his Majesty's Ports, Havens, or Harbours; or skulking within any of those Spaces called the *King's Chambers,* in order to surprize Merchants Ships belonging to the King's Friends and Allies, and to snap them as they are coming or going out of our Ports; you are to present such if you know any, and the King's Majesty is to be inform'd of it out of the

Records and Presentments of this Court; that they may be seized and arrested, if they be driven, or do come in, or else may be fetch'd in by his Majesty's Ships, and punish'd as wilful Violators of the Treaties his Majesty hath with his Neighbours, and as malicious Disturbers of our Trade.

xcvi You are to enquire if any Men of War have presumed to search, stop, or carry away by Force, our Merchant Ships in their Course at Sea, under Pretence or Suspicion that they belonged to their Enemies; if they have brought them out of their Course to their own Ports without sufficient Cause, such as is allow'd of by Treaty between his Majesty and the Prince or State from which the Man of War hath his Commission; that is a grievous Trespass, and the Party that hath done it, coming into any of his Majesty's Ports, may be arrested, and his Ship made to answer and satisfie the Merchant's Damage. If they have robb'd or pillaged them, it is downright *Piracy,* as I have already told you.

You are to enquire, if any foreign Men of War have broken the safe Conduct granted by his Majesty to any of his Allies within the four Seas, or have presumed to fight or act Hostilities against each other, when any of his Majesty's Men of War were in Sight, and had given the Signal to forbear and keep the Peace. These Rights of the *Flag*, of giving *Sanctuary*, *Protection*, and *safe Conduct*, are Emanations of his Majesty's Soveraignty in these Seas, and where you know of any Thing done to the Infringement, or in Derogation of them, you are to present and specifie the Particulars, to the End they may be laid before his Majesty, that he may, in his Royal Wisdom, provide some Remedy and Redress, either by giving Orders to his Men of War at Sea, or to his Officers in Port, to arrest such Ship and Commanders, as shall have offended in any of these Particulars, or else may, by his Ministers and Ambassadors abroad, demand such Reparation and Satisfaction, as by the Law of Nations is due.

xcvi Having done with the Crimes and Offences, specially directed in the Statute of *Hen.* VIII, to be here enquired of; I shall in a very few Words tell you, what you are to enquire of upon *other Statutes* related to and specially *cited in this Commission*, for the due Execution of which, the Justices of this Court are specially appointed by his Majesty, to be his Justices of Peace and Goal-Delivery.

You are to enquire of all *Nusances and Abuses upon our Salt-Waters* and Navigable *Rivers*, beneath those Bridges that are next the Sea; by erecting of Water-Mills, Wears, Stakes, or Kiddles, whereby the free Course and Passage of Boats and Vessels is hindred, or the young Fry of Fish destroy'd, and you are to present as many as are within the Limits of this Commission.

* * *

xcvi You are to enquire of all such as use any *unlawful Arts*, Engines, Nets, or Means, to *catch Fish* withal upon the Sea, or below the lowest Bridges, contrary to the Statutes in that Behalf provided, and contrary to the ancient Ordinances of the Admiralty, likewise such as do destroy Fish out of proper Seasons, or while they are of an *unsizeable Growth*, and particularly such as dredge for *Oysters*, between the *3d* of *May* and the 14 of *September*, that is, out of the Seasons prefix'd by the ancient Statutes of the Admiralty.

You are to enquire of all *Forestallers*, *Regratters*, and *Engrossers* of our Merchandizes and Provisions, while they are yet upon the Sea, or in our Rivers in the Way to our Ports or Markets, or diverted them from coming to Market, thereby to keep up the Rate of their Commodities. This was anciently *Felony* in some Cases, and is still severely punishable by Law.

* * *

Maine *et al.* Ex. No. 768

Commissioners For Trade and Plantations, **Journal of 1718-1722, pp. 31-35, 43, 53-54-90-98, 100, 102, 104-05, 122, 209, 217, 361-62 (1925)**

* * *

Their Lordships taking into consideration the business relating to the boundaries of His Majesty's Plantations in America, and to the incroachment of the French upon them, read,

Mr. Nelson's memorial relating to the means the French use, to gain the Indians to their interest, and methods

proposed to be used by us for our defence and security against the designs of the French. Plantations General A., Fol. 42.

Mr. Nelson's scheme to reduce Canada, with an account of those settlements. Plantations General A., Fol. 54.

Representation from the Board concerning the Northern Colonies of America, recommending the methods proposed by Mr. Nelson for propagating the British interest in those colonies and proposing the constituting of a Captain General, dated Sept. 30th, 1696. Plantations General A., Fol. 59.

Letter from Mr. Randolph to the Board, dated at New York the 16th May, 1698, about the boundaries between the English and French plantations. Plantations General A., Fol. 305.

Letter to Mr. Secretary Vernon about the encroachments of the French upon the English territories on the Continent of America, and the right of fishery in the adjoyning seas. Dated 17th Feb., 1698/99. Plantations General B., Fol. 12.

Letter to Mr. Secry. Vernon about the encroachments of the French upon the eastern parts of New England both by sea and land. Dated 29th December, 1698. New England B., Fol. 84.

* * *

U.S. Ex. No. 4

Answer of State of California, Part I.

* * *

33 11. As an illustration of an early grant by a King of England of land under the sea, in 1658 the French port of Dunkirk passed to England, which thereafter claimed the ownership not only of the uplands but of the submerged lands in the Channel adjacent to Dunkirk. On October 27, 1662, Charles II sold to France, Dunkirk and its dependencies for the sum of 5,000,000 francs. This sale and transfer included the owership of submerged lands in the Channel off the coast of France adjoining Dunkirk.

"The sale of Dunkirk and its dependencies *included submerged lands in tidal waters,* tideways, foreshores, uplands, quays, docks, canals, forts, guns, ammunition and the great cathedral." (MERSHON, "THE POWER OF THE CROWN IN THE VALLEY OF THE HUDSON" (1925), p. 13.)

* * *

U.S. Ex. No. 8

Brief for the State of California in Opposition to Motion for Judgment

23 This Court and the courts of our States have repeatedly declared what the common law of England was in 1776 with regard to those rights of the Crown to which the original States succeeded. The following are a few of the leading cases on this subject:

Martin v. Waddell, 16 Pet. 367, 412 (1842), by Mr. Chief Justice Taney:

> "It is said by Hale, in his treatise *de Jure Maris*, Harg. Law Tracts 11, when speaking of the navigable waters, and the sea on the coasts within the jurisdiction of the British crown, 'that although the king is the owner of this great *coast*,[18] and as a consequent of his propriety, hath the primary right of fishing in the sea, and creeks and arms thereof, yet the common people of England have, regularly, a liberty of fishing in the sea, or creeks or arms thereof, as a public common of piscary, and may not, without injury to their right, be restrained of it, unless in such places, creeks or navigable rivers, where either the king or some particular subject hath gained a propriety exclusive of that common liberty.' "

Weber v. Board of Harbor Comm., 85 U.S. 57, 65 (1873), by Mr. Chief Justice Field:

> "By that law [the common law] the title to the shore of the sea, and of the arms of the sea, and in the *soils under tidewaters*[19] is, in England, in the king, and, in this country, in the State."

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18 The word used by Hale is "waste," here misquoted as "coast."

19 "Tidewaters" obviously includes the waters of the ocean, all of which are affected by the tides. This Court held in *Manchester v. Massachusetts*, 139 U.S. 240, 258 (1891):

> " . . . the minimum limit of the territorial jurisdiction of a nation over tidewaters is a marine league from its coast . . . "

See, also, H.A. Marmer, Assistant Chief of the Division of Tides of the United States Coast and Geodetic Survey, *The Tides* (1926), pp. 132, 133.

(Continued)

24 *Shively v. Bowlby*, 152 U.S. 1, 13 (1894), by Mr. Justice Gray:

> "In England, from the time of Lord Hale, it has been treated as settled that *the title in the soil of the sea*, or of arms of the sea, below ordinary high water mark, *is in the King*, except so far as an individual or a corporation has acquired rights in it by express grant, or by prescription or usage; [citing cases] and that this title, *jus privatum*, whether in the King or in a subject, is held subject to the public right, *jus publicum*, of navigation and fishing."

Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 65 (1851), by Chief Justice Shaw:

> "By the common law of England, as it stood long before the emigration of our ancestors to this country and the settlement of the colony of Massachusetts, *the title to the land or property in the soil, under the sea*, and over which the tide waters ebbed and flowed, including flats, or the sea-shore, lying between high and low water mark, *was in the king*, as the representative of the sovereign power of the country. But it was held by a rule equally well settled, that this right of property was held by the king in trust, for public uses, established by ancient custom or regulated by law, the principal of which were for fishing and navigation."

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19 (Continued) The term "tidewaters" is not to be confused with "tidelands" which sometimes, but by no means always, is used to refer to the narrow strip of land between high and low tide. See note, Appendix F, p. 118, where "tidelands" is construed by a California court to include submerged lands below low-water mark.

25 *Weston v. Sampson*, 62 Mass. (8 Cush.), 346, 351-352 (1851), by Chief Justice Shaw:

> "... *the king is held to be owner of the soil under the sea*, which royal right, by the common law of England, extends over the shore where the tide ebbs and flows to ordinary high water mark."

Commonwealth v. Roxbury, 75 Mass. (9 Gray), 451, 482 (1857), by Chief Justice Shaw:

> "We had considered it settled beyond controversy that, by the common law of England, *the right of soil, not only in the sea, the fundus maris, was in the king*, but also in the sea shore, the land between high and low water mark ...
>
> * * * * * * *
>
> "... at the time of the granting of the colony charters herein before stated, the king held the sea shores *as well as the land under the sea;* ... he held the same *publici juris* for the use and benefit of all the subjects, for all useful purposes, the principal of which were navigation, and the fisheries."

People v. New York & S.I. Ferry Co., 68 N.Y. 71, 76 (1877):[20]

> "The title to lands under tide-waters, within the realm of England, were, by the common law, deemed to be vested in the king as a public trust, to subserve and protect the public right to use them as common highways for commerce, trade and intercourse. ... In the treatise De Jure Maris (p. 22)

[20] Quoted with approval by Mr. Justice Field in *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 458 (1892).

> Lord Hale says: 'The *jus privatum* that is acquired to the subject, either by patent or prescription, must not prejudice the *jus publicum*, wherewith public rivers and arms of the sea are affected to public use;' ..."

26 *Rogers v. Jones*, 9 N.Y. Com. L. (1 Wend.) 237, 256 (1828):

> "In England, it hath always been holden that the King is lord of the whole shore. He has the property *tam aqua quam soli* and all profits *in the sea*, and all navigable rivers."

Gough v. Bell, 22 N.J.L. (2 Zab.) 441, 455 (1850):

> "The ancient rule of the common law is, that the ... title to the *shore* between ordinary high and low water mark, *as well as the title to the soil under the water*, belongs, *prima facie*, to the sovereign. *Hale de Jure Maris, part* 1, *cap* 4; *case of the River Banne*, Davies 152; *Woolrich on Waters*, 20; ..."

Arnold v. Mundy, 6 N.J.L. (1 Halst.), 1, at 74 (1821):

> "Lord Hale says, 'the sea, and the arms of the sea, and the navigable rivers in which the tide ebbs and flows, are of the dominion of the king, as of his proper inheritance; and that this dominion, embraces, also, the shores, ...'"

Narragansett Real Estate Co. v. McKenzie, 82 Atl. 801, at 810 (R.J., 1912):

> "It is well settled in England that *the title in the bed of the ocean is in the sovereign*, subject to the *jus publicum* – the right of navigation and fishery of which the public cannot be deprived. *In this country, where the people are sovereign, the title to the bed*

of the ocean is in the state, which represents the sovereign power; . . . "[21]

* * *

31 B. The Original States in 1776 Succeeded to All Rights and Property of the English Crown.

In the previous section it has, we submit, been demonstrated that the English Crown did own lands below low-water mark and outside "inland waters" prior to 1776. The *extent* of the sovereign's ownership will be discussed later. (*Infra*, pp. 174 *et seq.*) We are concerned here only with the principle that such ownership existed.

This Court has repeatedly held that all the rights and properties of the Crown (not theretofore granted) passed on July 4, 1776 to the thirteen States as separate and independent states. *Each state* succeeded to all the rights and properties of the Crown within its own jurisdiction and territory.

A few of the leading cases holding that the States, independently, succeeded to all rights of the Crown are:

Martin v. Waddell, 16 Pet. 367, 410 (1842):

> "For when the Revolution took place, the people of each state became themselves sovereign; and in

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[21] Other cases containing similar statements as to the common law of England are: *New York, B. H. & H. R. Co. v. Horgan*, 56 Atl. 179, at 180 (R. I., 1903); *Armour & Co. v. City of Newport*, 110 Atl. 645, at 646 (R. I., 1920); *Simmons v. French*, 25 Conn. 345, at 351 (1856); *Furman v. City of New York*, 7 New York Superior Court 17, at 33 (1851). There are no authorities to the contrary.

> that character hold the absolute right to *all their navigable waters and the soils under them*, for their own common use, subject only to the rights since surrendered by the Constitution to the general government."

The above statement is quoted with approval in *Munford v. Wardwell*, 6 Wall. 423, 436 (1867) and also in *Illinois Central Ry. Co. v. Illinois*, 146 U.S. 387, 456 (1892).

Shively v. Bowlby, 152 U.S. 1, 14-16 (1894):

> "And upon the American Revolution, *all the rights of the Crown and of Parliament vested in the several States*, subject to the rights surrendered to the
32 national government by the Constitution of the United States."

Appleby v. City of New York, 271 U.S. 364, 381 (1926):

> "Upon the American Revolution, all the proprietary rights of the Crown and Parliament in, and all their dominion over, lands under tidewater vested in the several States, subject to the powers surrendered to the National Government by the Constitution of the United States."

County of St. Clair v. Lovingston, 90 U.S. 46, at 68 (1874):

> "By the American Revolution the people of each State, in their sovereign character, acquired the absolute right to all their navigable waters and the soil under them. The shores of navigable waters and the soil under them were not granted by the constitution to the United States, but were reserved to the States respectively."

Massachusetts v. New York, 271 U.S. 65, 85-86 (1926):

"The English possessions in America were claimed by right of discovery. The rights of property and dominion in the lands discovered by those acting under royal authority were held to vest in the Crown, which under the principles of the British Constitution was deemed to hold them as a part of the public domain for the benefit of the nation. Upon these principles rest the various English royal charters and grants of territory on the Continent of North America. *Johnson v. McIntosh*, 8 Wheat. 543, 577 *et seq.*, 595. As a result of the Revolution, the people of each State became sovereign and *in that capacity acquired the rights of the Crown* in the public domain (*Martin v. Waddell*, 16 Peters 367, 410), . . ."

33

Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 82 (1851):

"This right of dominion and controlling power over the sea and its coasts, shores, and tide waters, when relinquished by the parent country, must vest somewhere; and, *as between the several states and the United States*, whatever may have been the doubts on the subject, *it is settled that it vested in the several states*, in their sovereign capacity, respectively, *and was not transferred to the United States by the adoption of the constitution* intended to form a more perfect union."

People v. Trinity Church, 22 N.Y. 44, 46 (1860):

"When, by the Revolution, the Colony of New York became separated from the Crown of Great Britain, and a republican government was formed, the People succeeded the King in the ownership of

all lands within the State which had not already been granted away, . . ."

It would hardly seem that more authority is needed to establish the fact that the States did succeed to all rights of the Crown in navigable waters and the soils under them. Whether some elements of "external sovereignty" may have passed direct to the "United States" as an entity separate from the individual States as claimed by plaintiff, is a different question. Plaintiff makes this assertion (Br. pp. 76-78) upon the authority of *obiter dicta* in *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304 (1936).

34 Even if it should be conceded that "external sovereignty" passed from the Crown over the heads of the States to the "United States," it would be immaterial in this case because of the incontrovertible fact that the vesting of external sovereignty in the central government, *from whatever source*, was entirely *unaccompanied by any cession of territory*.

* * *

50 2. Jurisdiction, Territory and Ownership Are Coextensive.

The application of the principle above set forth is especially clear in the case of the original thirteen States because these States existed before the Federal Government was formed. It is, of course, true that large areas of land within these States had been granted by the prior sovereign and remained in the possession of their owners under the new sovereign. But no questions are raised as to the Original States such as those raised in connection with the Acts admitting new States to the Union. When the original States became independent there was no

reservation to anyone of the primary disposal of the public lands. Persons holding land under valid grants continued to hold such land, but all other lands necessarily vested in the new sovereign whose ownership was, therefore (except as to such prior grants) fully *co-extensive with its territorial jurisdiction.* Since it has been demonstrated that the territorial jurisdiction of the original States included a belt of the sea, it follows indubitably that the original States must have owned the bed of this belt of marginal sea. And since, as we have shown, they did not cede it to the Federal Government, they must continue to own it.

The principles we have been discussing, namely, (1) that the ownership of the original States in the bed of the sea was and is co-extensive with their territorial jurisdictions, and (2) that such lands were not ceded to the Federal Government, have been expressly stated by this Court in many decisions and are implicit in the rulings
51 of the Court in all its decisions dealing with the ownership of lands beneath navigable waters.

We propose now to take up a series of decisions illustrative of the application of both these principles by this Court.

(a) NEW YORK v. CONNECTICUT, 4 DALL. 1 (1799).

This case involved title to a strip of land claimed by both States, and both States had made grants to individuals within the disputed territory. In other words, the land had, in the first instance, belonged to either one or the other of the two States. The attorney general for New York argued that the case involved not only the question of the jurisdiction of the respective states but

> ". . . it involves the right of soil, which, in relation to a great part of New York, results from the right of jurisdiction; so that, deciding the latter, is virtually a decision of the former." (p. 4.)

There was no final decision in the case but the reported decision quotes Justice Patterson as stating in the course of the argument that

> "Generally speaking, the proposition is true, that as to states, *jurisdiction and the right of soil go together.*" (p. 4, note (b).)

(b) UNITED STATES v. BEVANS, 3 WHEAT. 336 (1818).

This case involved the jurisdiction of Massachusetts to prosecute for the crime of murder committed on a ship in Boston Harbor some distance from the land. The decision is of vital importance as showing the relationship
52 between jurisdiction, territory and ownership. The court, by Chief Justice Marshall, held (pp. 386-387):

> ". . . What then is the extent of jurisdiction which a state possesses? We answer, without hesitation, the jurisdiction of a state is co-extensive with its territory; co-extensive with its legislative power. The place described is unquestionably *within the original territory of Massachusetts.* It is, then, within the jurisdiction of Massachusetts, unless that jurisdiction has been ceded to the United States."

The argument made in the *Bevans* case was basically the same as that advanced by plaintiff in the present case, namely, that there is something inherent in the distribution of powers under the Constitution between the States and the Federal Government (Br. pp. 72 *et seq.*) which gives the Federal Government title to the lands beneath

navigable waters. In the *Bevans* case the argument was that the vesting of admiralty and maritime jurisdiction in the Federal Government was an actual cession of the waters of the State which would have given the Federal Government exclusive jurisdiction over the offense charged. In response to this Chief Justice Marshall said (p. 388):

> "Can the cession of all cases of admiralty and maritime jurisdiction be construed into a cession of the waters on which those cases may arise? This is a question on which the court is incapable of feeling a doubt. The article which describes the judicial power of the United States *is not intended for the cession of territory*, or of general jurisdiction. It is obviously designed for other purposes. It is in the
53 *8th section of the 2d article,*[46] *we are to look for cessions of territory* and of exclusive jurisdiction. . . . It is observable, that the power of exclusive legislation (which is jurisdiction) is united with *cession of territory, which is to be the free act of the states.*"

It is clear from the above quotation that the ownership of territory and general jurisdiction of the State were, in the first instance, co-extensive.

The reason Chief Justice Marshall said that the constitutional grant of admiralty and maritime jurisdiction to the Federal Government was not a cession of territory was to negative the claim that the United States had general political jurisdiction over the area in question. The holding that the territory had not been ceded to the United States was, therefore, not *dictum*, but was necessary

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46 The reference to the 2d article is obviously a textual error; the article referred to is the 1st article.

to the decision of the case. If Boston Harbor belonged to the United States, it would have had jurisdiction. The Court had to determine that there was no ownership in the United States in order to determine that the United States had no jurisdiction.

It is of course true that, in the words of the decision, the offense in the *Bevans* case took place within a harbor. In view of the fact that plaintiff in this case does not concede that Massachusetts Bay is a "true bay" (Br. p. 254), plaintiff is certainly not in a position to say that the effect of this decision is limited to "inland waters." However, for the purpose of this discussion we may assume that the offense in the *Bevans* case was committed within a "true" harbor. The fact remains that the decision was
54 not predicated upon any distinction between inland waters and marginal sea. The essence of the decision is that constitutional grants of power involve no cession of territory. If this principle is applicable in Boston Harbor it must be applicable anywhere within the State's territorial jurisdiction. And if this principle is applicable to grants of admiralty and maritime jurisdiction, it must also be applicable to grants to the Federal Government of other powers, *whether external or internal in character*. Furthermore, when Chief Justice Marshall said that there had been no cession of territory by the State, he must have believed that the State could have made a cession. If the State had no title to cede, the statement that it had made no cession would have been meaningless. Implicit in this decision is the basic proposition above stated, that the State of Massachusetts owned all the lands within its territorial jurisdiction not previously granted to other parties.

(c) CORFIELD V. CORYELL, 6 FED CAS. NO. 3,230, P. 546 (1823).

The principle thus announced by Chief Justice Marshall has been followed with respect to other powers vested in the Federal Government by the Constitution. An early decision on this point is *Corfield v. Coryell,* 6 Fed. Cas. No. 3,230, p. 546. This case involved the validity of a statute of New Jersey regulating the taking of oysters within the *waters of the state.*

Again, in this case, argument similar to that made by plaintiff here was advanced, namely, that constitutional grants of power to Congress to regulate interstate and foreign commerce gave the Federal Government paramount power over the waters within the State of New Jersey.
55 It was in regard to this point that Mr. Justice Washington said (p. 551):

> ". . . The grant to congress to regulate commerce on the *navigable waters belonging to the several states,* renders those waters the public property of the United States, for all the purposes of navigation and commercial intercourse; subject only to congressional regulation. *But this grant contains no cession, either express or implied, of territory, or of public or private property.*"[47]

In this case, as in the *Bevans* case, the ground of the decision was not that the act was committed in a bay, but that it was committed within the territory of the

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47 Followed with approval by this Court on several occasions: *Smith v. Maryland,* 18 How. 71, 74 (1855); *Manchester v. Massachusetts,* 139 U.S. 240, 262 (1891).

State and that there had been no cession of that territory to the Federal Government.[48]

(d) RHODE ISLAND V. MASSACHUSETTS, 12 PET. 657 (1838).

An important application of the principles of the *Bevans* and *Corfield* cases was made by this Court in the case of *Rhode Island v. Massachusetts,* which appears in the Supreme Court reports eight times. In the third reported decision, 12 Pet. 657, 733 (1838), the argument was advanced that ownership of land by the State depended on whether or not the land was within the State's jurisdiction which, in turn, depended on the location of the
56 State's boundary. On this question the court said, relating to the disputed boundary line (pp. 733-734):

> "The locality of that line is matter of fact, and when ascertained, separates the territory of one from the other; for neither state can have any right beyond its territorial boundary. It follows, that when a place is within the boundary, it is a part of the territory of a state; *title, jurisdiction and sovereignty are inseparable incidents, and remain so, till the state makes some cession* The plain language of this court in the *United States v. Bevans,* 3 Wheat. 386 *et seq.,* saves the necessity of any reasoning on this subject * * * *Title, jurisdiction, sovereignty, are, therefore, dependent questions, necessarily settled, when boundary is ascertained, which, being the line of territory, is the line of power over it; . . .*"

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48 In *Corfield v. Coryell* (p. 546) the Attorney General of New Jersey asserted that the "territorial jurisdiction" of New Jersey extended "on the sea, to at least a marine league," and the Act under consideration applied to all the "waters of the state."

This decision demonstrates that the principles of the *Bevans* case govern the question of ownership as well as jurisdiction. Thus, the ownership of lands by a State (except as they have been granted out) is co-extensive with the State's jurisdiction.

(e) MARTIN V. WADDELL, 16 PET. 366 (1842).

In this case the Court explicitly applied the principle under discussion, that all lands within the jurisdiction of the State not previously granted belong to the State.

> ". . . According to the theory of the British constitution, all vacant lands are vested in the crown, as representing the nation, and the exclusive power to grant them is admitted to reside in the crown, as a branch of the royal prerogative. It has been already shown, that this principle was as fully recognized in America as in the island of Great Britain." (p. 410.)

57 Upon this fundamental ground the Court held that the people of the State of New Jersey (p. 410)[49]

> ". . . hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government."

(f) POLLARD'S LESSEE V. HAGAN, 3 HOW. 212 (1845).

We shall discuss this case later in connection with the discussion of the effect of the reservation in the Acts

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[49] This case involved land in Raritan Bay, but it is doubtful whether Raritan Bay is a "true bay" as that term is used by plaintiff. However, assuming it to be a "true bay," the decision was not predicated on that fact but on the fundamental fact that the land was under navigable waters *within the territory of the State.*

admitting new States to the Union of the "primary disposal of the public lands." At this point we desire to refer only to the fact that the decision in this case is predicated on the same fundamental principle that ownership by the State is co-extensive with its jurisdiction. On this point the Court said (p. 228):

> "Alabama, is, therefore entitled to the sovereignty and jurisdiction over *all the territory within her limits*, . . . "

Sovereignty and jurisdiction were held to include ownership and upon this principle the Court held, on the authority of *Martin v. Waddell* (p. 229) that

> ". . . to Alabama belong the navigable waters, and soils under them . . . "

58 (g) DUNHAM V. LAMPHERE, 69 MASS. (3 GRAY) 268 (1855).[50]

This case involved the validity of a Massachusetts statute regulating the taking of fish in "the open sea," "within one mile of Gravel Island." The first question was whether the act took place *within the territory of the State.* On this question the court said, by Shaw, Chief Justice (p. 269):

> *"Being within a mile of the shore puts it beyond doubt that it was within the territorial limits of the State,* although there might in many cases be some difficulty in ascertaining precisely where that limit is. We suppose the rule to be, *that these limits extend a marine league, or three geographical miles, from the shore;* . . . "

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[50] Decided four years before Massachusetts statute fixing seaward boundary of Massachusetts at 3 miles from shore.

The court then considered the question whether

> "... the right both of *property and dominion over the sea-shore, within the territorial limits* of a sovereign state, and all its incidents – navigation, fishing and all other incidental benefits – ... belong properly to the general government or remain with the state government" (pp. 271-2).

The court answered this question unequivocally by holding that dominion and control over these waters, when relinquished by the government of Great Britain, did

> "fully and absolutely vest in the several states. This had been definitely settled by the supreme court of the United States." (Citing *Pollard v. Hagan.*)

It is vitally important to note that here the court applied the principle that ownership is co-extensive with jurisdiction
59 in lands beneath the open sea within the three-mile belt, basing its decision to the authority of *Pollard v. Hagan.*

The question at once arises: Why did the court cite *Pollard v. Hagan,* which is a case involving only the question of *ownership*, as authority in a case involving only the question of *jurisdiction?* And the answer is that jurisdiction and ownership by a state of land within its boundaries are based on the same fundamental principle. If the state owned the property it had jurisdiction. *Pollard v. Hagan* was cited to show that the state did own the area in question.[51] But the converse is equally true. If the state has jurisdiction it likewise has ownership

[51] The reference to *Pollard v. Hagan,* shows that the Massachusetts court did not consider that the principle of *Pollard v. Hagan* was limited to "inland waters."

(except as it has been granted away.)[52] And since the state has jurisdiction to the limits of its territorial boundaries, so it has ownership to the same limits. The inland waters and the high and low tides are false quantities in the problem. The controlling factors are (1) that the land in question is within the boundaries of the state, and (2) such land has not been granted or ceded to the Federal Government.

(h) Commonwealth of Massachusetts v. Manchester, 152 Mass. 230, 9 L.R.A. 236 (1890).

This case involved the validity of a statute regulating the use of nets or seines for taking fish in the waters of
60 Buzzard's Bay.[53] The decision was rendered in 1890 by a unanimous court, of which Mr. Justice Holmes was then a member, the opinion being written by Chief Justice Field.

The court was asked to overrule *Dunham v. Lamphere* but refused to do so. The principle of *Dunham v. Lamphere* was followed as the controlling authority.

It is important to note that the arguments of defendant in the *Manchester* case were strikingly similar to those of

[52] It must be borne in mind that we are now considering the ownership of lands beneath the marginal sea within the *original States,* so no question is involved of the effect of a reservation of lands over which the State might have jurisdiction without ownership. The effect of such a reservation will be considered in connection with the Act of Admission of California and other new States.

[53] We may assume, for the purpose of this discussion, that Buzzard's Bay would be classed as "inland water" although it was strenuously argued that Buzzard's Bay was, in a legal sense, "open sea."

plaintiff in the present case, both as to the rights derived from "the position of the national sovereign" and also as to the superior right of the Federal Government to control the fisheries. Plaintiff in the present case asserts (Br. p. 87) that

> ". . . the exclusive right to take the fish found in the waters bordering the littoral nation is, for its full enjoyment, largely dependent upon the powers of the United States."

This is one phase of plaintiff's argument that the United States, by performing its constitutional duties, can acquire rights for itself *as against the States.* The argument in the *Manchester* case was essentially the same. Manchester's position and the court's answer to it are set forth in the following quotation (9 L.R.A. 241):

> "But it is argued that if the fisheries of Buzzard's Bay are within the control of either the State of Massachusetts or of the United States, this control by the Constitution of the United States is exclusively with the United States. The question is therefore whether the Statutes of Massachusetts which have
> 61 been cited are repugnant to the Constitution and laws of the United States. *There is no belt of land under the sea adjacent to the coast which is the property of the United States and not the property of the States."*

Here we have a definite and unqualified statement by a Court comprised of such able jurists as Chief Justice Shaw and Justice Holmes that the United States owns no belt of land adjacent to the coast of any State. It is difficult to believe that this Court did not know what it was talking about when it made this statement. Furthermore, this statement was not *obiter dictum*, for the same reasons

that Chief Justice Marshall's statements regarding the cession of territory in *United States v. Bevans* were not *obiter dicta.* The statement was made as an answer to Manchester's contention that the control of fisheries was vested in the Federal Government by the Constitution. Therefore, although the *Manchester* case is a jurisdictional case, the court had to find that the United States did not own the land under the sea in order to negative the possibility that jurisdiction was in the United States.

The fact that the case of *Dunham v. Lamphere* involved the open sea, whereas the *Manchester* case involved Buzzard's Bay, is vitally important when it is seen that *both cases are decided upon the same principle,* namely, that the offense was committed within "the territorial limits of the State, . . ." The ruling which pertained to the open sea was used as authority for the case which arose in Buzzard's Bay. It would be hard to find stronger evidence of the proposition that there are no "pivotal" or "crucial"[54] distinctions between these waters by reason of which one
62 is vested in the Federal Government and the other in the State, as asserted by plaintiff in this case.

(i) MANCHESTER V. MASSACHUSETTS, 139 U.S. 240 (1891).

In the above case this Court affirmed in all particulars the decision of the Massachusetts court just discussed. Again, the striking similarity between the contention of Manchester and those of plaintiff in the present case will be observed. The Court sums up the arguments for Manchester in the first paragraph of the decision, as follows (p. 254):

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[54] Plaintiff's Br. pp. 9, 66.

"The principal contentions in this court on the part of the defendant are that, . . . when she [Massachusetts] became one of the United States, she surrendered to the general government her right of control over the fisheries of the ocean, and *transferred to it her rights over the waters adjacent to the coast and a part of the ocean;* that, as by the Constitution, article 3, section 2, the judicial power of the United States is made to extend to *all cases of admiralty and maritime jurisdiction*, it is consistent only with that view that the rights in respect of fisheries should be regarded as *national rights*, and be enforced only in national courts; that the *proprietary right* of Massachusetts is confined to the *body of the county;* that the offense committed by the defendant was committed *outside of that territory, in a locality where legislative control did not rest upon title in the soil and waters*, but upon rights of sovereignty inseparably connected *with national character* . . . "

Further to see the significance of these contentions, it is important to quote from the brief of plaintiff in error,
63 apparently written by Joseph H. Choate. From this brief we quote the following (pp. 8-9):

> "Our argument is that the territory of Massachusetts was defined under the law of England, and that when she adopted the Constitution her domain was limited, as far as proprietary title is concerned, by the body of the county, in accordance with the established principles of that law.
>
> "It was *without this territory* that the offense with which Manchester is charged took place, in a locality where legislative control did not rest upon title in the soil and waters, *but upon rights of sovereignty inseparably connected with national character* . . . "

This Court rejected the entire argument that Federal control rested upon rights "inseparably connected with national character" and applied the principle of *United States v. Bevans* and other decisions which hold that the vesting of sovereign powers in the Federal Government did not constitute a cession of territory (139 U.S. pp. 260, 261, 263, 264).

In support of the argument that Massachusetts had no jurisdiction below low-water mark, Mr. Choate also relied on the case of *Queen v. Keyn.* As we have stated, (*supra*, pp. 28-29), this Court in the *Manchester* case held the *Keyn* case to be wholly inapplicable.

Two important cases relied upon by the Court in the *Manchester* case were *Smith v. Maryland* and *McCready v. Virginia.* The following brief quotations from these cases show that in both of them the Court applied the principle that the original States own the beds of all navigable waters within their limits.

64 (j) SMITH V. MARYLAND, 18 HOW. 71, 74 (1855):

> "Whatever soil below low-water mark is the subject of exclusive propriety and ownership, belongs to the State on whose maritime border, and within whose territory it lies, subject to any lawful grants of that soil by the State, or the sovereign power which governed its territory before the declaration of independence. Pollard's Lessee v. Hagan, 3 How. 212; Martin v. Waddell, 16 Pet. 367; Den v. The Jersey Co., 15 How. 426.
>
> "But this soil is held by the State, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common

liberty of taking fish, as well shellfish as floating fish. Martin v. Waddell; Den v. Jersey Co.; Corfield v. Coryell, 4 Wash. R. 376; Fleet v. Hagemen, 14 Wend. 42; Arnold v. Munday, 1 Halst. 1; Parker v. Cutler Milldam Corporation, 2 Appleton (Me.) R. 353; Peck v. Lockwood, 5 Day. 22; Weston et al. v. Sampson, et al., 8 Cush. 347. The State holds the propriety of this soil for the conservation of the public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of the fishery. In other words, it may forbid all such acts as would render the public right less valuable, or destroy it altogether. *This power results from the ownership of the soil, from the legislative jurisdiction of the State over it,* and from its duty to preserve unimpaired those public uses for which the soil is held. Vattel, b. 1, c. 20, s. 246; Corfield v. Coryell, 4 Wash. R. 376. It has been exercised by many of
65 the States. See Angell on Tide Waters, 145, 156, 170, 192-3."

(k) McCready v. Virginia, 94 U.S. 391, 394 (1876):

"The principle has long been settled in this court, that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away. *Pollard's Lessee v. Hagan,* 3 How. 212; *Smith v. Maryland,* 18 How. 74; *Mumford v. Wardwell,* 6 Wall. 436; *Weber v. Harbor Commissioners,* 18 *id.* 66. In like manner, the States own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty. *Martin v. Waddell,* 16 Pet. 410."

We submit that plaintiff's contention that the original States did not own lands within the three-mile belt at the time of the formation of the United States has been conclusively answered by the foregoing authorities. They also furnish a conclusive answer to plaintiff's argument "that ownership of the submerged lands . . . if an attribute of sovereignty, is an attribute of national rather than local sovereignty."[55] This argument, as we pointed out, was rejected by this Court in *United States v. Bevans, Manchester v. Massachusetts,* and other cases previously discussed.

66 F. Lands Beneath Navigable Waters Are Held by the States by Virtue of, and as an Incident to, State Sovereignty.

We pass now to the alternative argument of plaintiff (Br. p. 143, *et seq.*) that "ownership of the submerged lands is not an attribute of sovereignty at all within the meaning of the equal footing clause."

It is of course true that in the broadest sense every act of the sovereign is done by virtue of its sovereignty and all property which the sovereign possesses is held by it as sovereign, or, in other words, as the governing power. When it is said that a State holds some property in a proprietary capacity and other property as an attribute of sovereignty, it is a convenient way of saying that the legal results (*i.e.*, obligations and duties) which flow from the ownership of one type of property are different from the legal results which flow from ownership of the other type of property. The real question is whether such differences do exist and whether they are based on valid and substantial grounds. If so, it is immaterial whether we

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55 Plaintiff's Br. pp. 9-10; 72-73; 89.

describe one type of legal result by calling it an attribute of sovereignty and the other by calling it proprietary, although this has been the practice of the courts from time immemorial, as we shall show.

There are many instances in which the governmental ownership of dry land does not involve any treatment that is substantially different from that required for similar land held by private individuals, and hence it is said that the sovereign owns such land "as a proprietor." But the ownership of navigable waters, because of their nature as highways of commerce and as the source of the common right of fishery, calls for the exercise of governmental
67 powers and duties which are different both in kind and degree from those powers which need to be exercised in relation to dry land. It was this doctrine which gave rise to the terminology *jus privatum* and *jus publicum*, used by Lord Hale [Appendix C, pp. 45-46], which simply meant that although the King owned the land as a proprietor, he held it subject to the public trust and that the administration of this trust was a necessary governmental duty or function.

This principle that lands beneath navigable waters are subject to these common rights of fishery and navigation has been consistently applied by the English courts from the earliest times to the present, as we show in the outline of the English decisions [see App. C, pp. 39-65].

The same principle of course applied when the original States succeeded to the rights of the Crown. They succeeded to the Crown's proprietary right in the bed of the sea but they also assumed, as sovereigns, the governmental function of protecting and regulating the public trust, that is, of protecting and regulating the rights of

the public in the use of the navigable waters for fishery and commerce. That is the factual and historical basis of the rule that the ownership of navigable waters vests in the State by virtue of its sovereignty.

The cases already cited show that the States' ownership of lands beneath navigable waters is in the *capacity of sovereign* in a sense different from its ownership of dry land. This was stated in *Martin v. Waddell, Pollard v. Hagan,* and, indeed, in all the cases cited *supra,* pp. 51-65. No better statement of the principle can be found than that in the opinion of this Court by Mr. Justice Stone in
68 *Massachusetts v. New York,* 271 U.S. 65, 89 (1926):

> ". . . The dominion over *navigable waters,* and property in *the soil under them,* are so identified with the exercise of the sovereign powers of government that *a presumption against their separation from sovereignty must be indulged,* . . . "

The same statement appears in *United States v. Oregon,* 295 U.S. 1, 14 (1935).

It is important to note that in these decisions the Court held that the dominion over navigable waters was identified with the sovereign powers of *state* government, not of the Federal Government. Yet plaintiff cites these very cases as holding that:

> "The presumption would be against any intention *of Congress* to sever the title from the sovereignty of *the United States* to which it was annexed. Cf. *Massachusetts v. New York,* 271 U.S. 65, 89; *United States v. Oregon,* 295 U.S. 1, 14." (Br. p. 73.)

What this Court holds to be a presumption against the separation of dominion over lands under navigable waters

from *state sovereignty*, plaintiff advances as an argument against the separation of such lands from the *sovereignty of the United States.*

The *Massachusetts* case is also of importance because it deals with the bed of Lake Ontario, the center of which constitutes the international boundary between the United States and Canada. The State is held to be the owner of the bed of that lake to the international boundary. If
69 there was any national interest which called for Federal ownership of lands beneath the three-mile belt of the ocean, it would seem such interest would apply even more strongly to the bed of a lake in which the boundary between this country and a foreign nation is located. Yet, as above stated, the Court held that the ownership of the bed of this lake was so closely identified with sovereignty *of the State* that a presumption against their separation must be indulged.

In the case of *Illinois Central R.R. Co. v. Illinois,* 146 U.S. 387 (1892), involving the title to the soil beneath Lake Michigan within the boundaries of the State, this Court described fully the different legal results which flow from ownership of lands beneath navigable waters as compared with dry land. On this point the Court said (p. 452):

> "That the State holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the State holds title to soils under tide water, by the common law, * * * But it is a *title different in character* from that which the State holds in lands intended for sale. It is different from the title which the United States holds in the public lands which are open to preemption and sale. It is a *title held in trust for the people* of

the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the *State may grant parcels of the submerged lands;* and, so long as their disposition
70 is made for such purpose, no valid objections can be made to the grants. *General language sometimes found in opinions of the courts, expressive of absolute ownership and control by the State of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases.* A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. *The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them,* so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, *than it can abdicate its police powers in the administration of government and the preservation of the peace."*[56]

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56 Plaintiff cites this case (Br. p. 151) in support of its argument that the State may convey title to lands beneath navigable

(Continued)

An example of the application of this rule is found in *United States v. Chandler-Dunbar W.P. Co.*, 209 U.S. 447 (1908). The case involved the character of the State of Michigan's ownership of land beneath navigable waters in
71 the bed of the St. Mary's River. Incidentally, the center of this river was the boundary between the United States and Canada. If the Federal Government could acquire a proprietary right in the bed of navigable waters by reason of the national interest, it would seem that the Court would have so declared in this case, in view of the existence of the international boundary line in the bed of the river. Nevertheless, the Court, through Mr. Justice Holmes not only upheld the State's title, but said (pp. 451-452):

> ". . . The right of the State to grant lands covered by tide waters or navigable lakes and the qualifications, as stated in Shively v. Bowlby, 152 U.S. 1, 47, are that the State may use or dispose of any portion of the same *'when that can be done without substantial impairment of the interest of the public in such waters, . . .'* "

The principle as expressed by Mr. Justice Holmes is invariably applied in the development of a harbor. Ships cannot land on a beach between high and low tide. Land must be filled and often leased or disposed of into private ownership for purposes of docks, wharves, warehouses

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56 (Continued) waters "free of any public trust." Obviously the case does not support plaintiff's statement. Plaintiff ignores the fact that this case holds that grants by the State of submerged lands are valid only when they can be made without impairing the public trust. This was the holding in *Weber v. Board of Harbor Commissioners*, 18 Wall. 57, 66 (1873); *Boone v. Kingsbury*, 206 Cal. 148 (1928) and *City of Long Beach v. Marshall*, 11 Cal. (2d) 609, 614-615 (1938), also cited by plaintiff at this point.

and other uses incidental to navigation and fisheries. (See map of Los Angeles and Long Beach Harbors, p. 5.)

It would take too long to list all the cases of this Court which announce and rely upon this principle but we respectfully submit that the statements of Mr. Chief Justice Taney in *Martin v. Waddell*, and of Mr. Justice Field in *Illinois Central v. Illinois*, and of Mr. Justice Holmes in *United States v. Chandler-Dunbar W.P. Co.*, and of Mr. Chief Justice Stone in *Massachusetts v. New York*, and of
72 many other of the justices of this Court, are not "patently unsound."[57]

This public trust doctrine is embedded in the constitutional and statutory law of the various States as well as in the common law. Congress has followed a consistent course ever since the enactment of the Ordinance of 1787 for the government of The Northwest Territory. This Ordinance required that:

> "all navigable waters within the said State shall forever remain public highways, free to the citizens of said State and of the United States, without any tax, duty, impost, or toll, therefor, imposed by the said State."

This language in the Ordinance of 1787 governed the States formed out of The Northwest Territory, namely, Illinois, Indiana, Ohio, etc. This language was then embodied in the Acts of Admission of other newly admitted States such as Alabama, Mississippi, Louisiana, Oregon, Florida, California, etc. Likewise, Congress required the Southern States, when they were readmitted into the

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57 This Court unanimously applied the public trust doctrine to navigable waters in California in *United States v. Mission Rock Co.*, 189 U.S. 391, 407 (1903), citing many cases.

Union after the Civil War, to embody this same phrase in their State Constitutions or statutes.

* * *

101 H. Decisions and Authorities Upholding State Ownership of Bed of Sea Out to the Three-Mile Limit.

Plaintiff relies heavily upon the assumption (Br. p. 154) that there are no decisions in which this Court has definitely determined the question of the ownership of the bed of the sea within a State's territorial limits.

We have already discussed this question under subdivision E (*supra*, pp. 47-65), where we showed that the courts have definitely held that ownership by the original States of the beds of their navigable waters is co-extensive with their respective jurisdictions. We showed that the Court applied this principle as well to the open sea (*Dunham v. Lamphere*, approved in *Manchester v. Massachusetts*) as to bays and harbors. It is by no means correct to say that the Court has not definitely dealt with the subject of the State's ownership of the bed of the sea. A few other decisions dealing with the "open sea" are:

UNITED STATES SUPREME COURT.

(a) THE ABBY DODGE v. UNITED STATES, 223 U.S. 166 (1912).

The principle that the ownership by the State of the lands beneath navigable waters is co-extensive with its jurisdiction over such lands is graphically shown in *The Abby Dodge*.

The case is also important because the United States was a party to and, in fact, instituted the action.[78]

102 The main issue was the constitutionality of an Act of Congress adopted June 20, 1906, prohibiting the landing or sale of sponges taken by means of diving apparatus

> "from the waters of the Gulf of Mexico or Straits of Florida."

The Act did not specify whether its operation was limited to the territorial waters of the State or extended to the bed of the ocean outside the jurisdiction of the State. Appellant urged that the Act was unconstitutional, whichever way construed; *i.e.*, that Congress had no authority to legislate on this subject either within or without the territorial limits of the State.

The Court considered the Act from both aspects. Taking up first the claim that the Act applied *within the State*, the Court said (p. 173) that if this construction were to be accepted

> "the repugnancy of the act to the Constitution would plainly be established by the decisions of this court."

Here we have an unequivocal holding that an Act of Congress regulating the taking of sponges from the bed of the sea within the territorial waters of a State would be unconstitutional. And the reason for such unconstitutionality is given in the following passage, which the Court quoted from *McCready v. Virginia*:

> " 'The principle has long been settled in this court, that each State owns the beds of all tide-waters *within its jurisdiction*, unless they have been granted away.

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78 The docket title of the case is "The vessel 'Abby Dodge', A. Kalimeris, Claimant, Appellant, v. The United States."

Pollard's Lessee v. Hagan, 3 How. 212; *Smith v. Maryland,* 18 How. 74; *Mumford v. Wardwell,* 6 Wall. 486; *Weber v. Harbor Commissioners,* 18 *id.* 66. In like manner, the States own the tidewaters themselves, and the fish in them, so far as they are capable of
103 ownership while running. For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty. *Martin v. Waddell,* 16 Pet. 410. . . .

" 'The right which the people of the State thus acquire comes not from their citizenship alone, but *from their citizenship and property combined.* It is, in fact, *a property right,* and not a mere privilege or immunity of citizenship.' " (p. 177.)

This holding cannot be considered as dictum because it was one of the questions involved and necessary to be decided in that case. This appears from the following (p. 175):

"The obvious correctness of the deduction which the proposition embodies that the statute is repugnant to the Constitution when applied to sponges taken or gathered within state territorial limits, however, establishes the want of merit in the contention as a whole. In other words, the premise that the statute is to be construed as applying to sponges taken within the territorial jurisdiction of a State is demonstrated to be unfounded by the *deduction of unconstitutionality to which such premise inevitably and plainly leads.* This follows because of the elementary rule of construction that where two interpretations of a statute are in reason admissible, one of which creates a repugnancy to the Constitution and the other avoids such repugnancy, the one which

makes the statute harmonize with the Constitution must be adopted."

The Court then held the statute valid as an exertion of congressional power to regulate foreign commerce if the
104 Abby Dodge was gathering sponges *outside of State boundaries* and *only* in

"waters which by the law of nations would be regarded as the common property of all and was transporting the sponges so gathered to the United States, the vessel was engaged in foreign commerce, and was therefore amenable to the regulating power of Congress over that subject."

The court held that although the statute *so construed* was valid, the "averments of the libel" were indefinite and failed to *"negative the fact that the sponges may have been taken from waters within the territorial limits of a State."* Therefore, the court said that

"the libel failed to charge an element essential to be alleged and proved, in order to establish a violation of the statute."

This holding is squarely in accord with the rulings of *United States v. Bevans, Manchester v. Massachusetts, Pollard v. Hagan,* and other cases previously discussed. The Federal Government was held *not* to have jurisdiction to regulate the taking of sponges from the bed of the sea within the territorial limits of Florida *because* the bed of the sea *belongs* to Florida. Conversely, if the United States had owned the soil within three miles of the coast it could have prevented the taking of sponges from its own property.[79]

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[79] *Camfield v. United States,* 167 U.S. 518 (1897); *United States v. Beebe,* 127 U.S. 338 (1888).

It is also significant that the Court cited *Pollard v. Hagan, McCready v. Virginia* and *Martin v. Waddell.* These cases, plaintiff asserts, involved only "inland waters." But
105 here they are cited as furnishing the basis of the ruling that the State owns the beds of *all* waters within its territorial jurisdiction. This demonstrates that the governing principle does not rest on any supposed distinction between "inland waters" and the three-mile belt, but rather on the question whether the area in dispute is beneath navigable waters within the legally established boundaries of the State.

Finally, and perhaps the most significant thing about the *Abby Dodge* case is that Congress in 1914 recognized and gave effect to the Court's decision by amending the statute so as to make it effective only in waters

"outside of State territorial limits."

We have, therefore, a statutory recognition *by the United States itself,* acting in its sovereign capacity through Congress, that the Federal Government cannot exercise the proprietary right of an owner of the soil in the territorial waters of a State.

(b) NEW JERSEY V. DELAWARE, 291 U.S. 361 (1934). DECREE 295 U.S. 694 (1935).

This case involved the settlement of the boundary line between Delaware and New Jersey. The opinion by Mr. Justice Cardozo contains important statements concerning the ownership by the Crown of England of the beds of navigable waters and the like ownership of our States, and also concerning the sovereign capacity in which such ownership is held. On these points Justice Cardozo said:

". . . There is high authority for the view that power was in the Crown by virtue of the *jus privatum* to convey the soil beneath the waters for uses merely private, but subject always to the *jus publicum,* the right to navigate and fish. *Commonwealth v. Alger,* 7
106 Cush. 53; *People v. N.Y. & S.I. Ferry Co.,* 68 N.Y. 71, 76; *People v. Steeplechase Park Co.,* 218 N.Y. 459, 473; 113 N.E. 521; *Shively v. Bowlby,* 152 U.S. 1, 13; Hale De Jure Maris, p. 22. Never has it been doubted that the grant will be upheld where the soil has been conveyed as an incident to the grant or delegation of powers strictly governmental. *Martin v. Waddell's Lessee,* 16 Pet. 367, 410, 413; *Massachusetts v. New York,* 271 U.S. 65, 89, 90. In such circumstances, 'the land under the navigable waters passed to the grantee as one of the royalties incident to the powers of government; and were to be held by him in the same manner, and for the same purposes that the navigable waters of England, and the soils under them, are held by the Crown.' *Martin v. Waddell's Lessee, supra,* p. 413." (291 U.S. 373-374.)

It is important to note that here Justice Cardozo does not talk about "inland waters" but about "navigable waters" and the soils under them.

The above holding must be considered in relation to the final decree of the Court.

The decree in this case (295 U.S. 694) contains a description of the boundary lines as fixed by this Court between the two States. A map is attached to and made part of the decree and is contained in 295 U.S. opposite page 701. The boundary line, as described in the decree and shown on the map, *extends three miles into the*

Atlantic Ocean. The description in the decree of that portion of the line which extends into the Atlantic is as follows (p. 698):

> "Thence (13) in a straight line S 24° 06′ E True, be the distance more or less, *through Delaware Bay and seaward to the limits of the respective States of*
> 107 *New Jersey and Delaware in the Atlantic Ocean,* said course passing through a point located S 65° 54′ W True, 1303 yards from Brandywine Shoal Light."

It is clear from the above, together with the map, that the limits of the respective States are three miles oceanward of a line drawn between the headlands of Delaware Bay, namely Cape Henlopen to Cape May. It is also important to note that this Court adjudicated *ownership* by each State over the territory thus declared to be within its jurisdiction. On this point the Court decreed (pp. 698-699):

> "The State of Delaware, its officers, agents and representatives, its citizens and all other persons, are perpetually enjoined from disputing the *sovereignty, jurisdiction and dominion of the State of New Jersey over the territory adjudged to the State of New Jersey by this decree;* and the State of New Jersey, its officers, agents and representatives, its citizens and all other persons are perpetually enjoined from disputing the *sovereignty, jurisdiction and dominion of the State of Delaware over the territory adjudged to the State of Delaware by this decree.*"

The word "dominion,"[80] especially when used together with the words "sovereignty" and "jurisdiction," necessarily implies ownership.

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80 "'Dominion' is a word of definite legal meaning and means ownership or right to property or perfect or complete property or (Continued)

108 (c) LOUISIANA v. MISSISSIPPI, 202 U.S. 1 (1906).

This case involved the boundary between Louisiana and Mississippi. However, the dispute arose over the validity of an Act of the Legislature of Louisiana prohibiting nonresidents from "fishing oysters in Louisiana waters."

The Court determined that the boundary extends from the Pearl River

> ". . . thence south along the channel of that river to Lake Borgne. Pearl river flows into Lake Borgne, Lake Borgne into Mississippi Sound and Mississippi Sound *into the open Gulf of Mexico,* . . . " (p. 48.)

The problem was thus presented of locating the boundary through Lake Borgne and Mississippi Sound. Here the Court applied the doctrine of the Thalweg or "deep water channel." Mississippi contended that the rule of Thalweg

> "expires by its own limitation when such midchannel reaches Lake Borgne, which in contemplation of the rule is the open sea, and part of the waters of the Gulf of Mexico." (pp. 51-52.)

The Court rejected this argument on the ground that Lake Borgne and Mississippi Sound is not open sea, but an arm of the sea having a deep water channel. The rule of Thalweg was, therefore, applied until the deep water channel line reached the open sea, but obviously it could

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80 (Continued) ownership in a thing. *Whelan v. Henderson,* Tex. Civ. App. 137 S.W.2d 150, 153." (13 Words and Phrases, Cum. An. Pock. Part, 51.)

Gruber v. Pac. States Sav. & Loan Co., 13 Cal. (2d) 144, 148; *Fisher v. Pickwick,* 42 Cal. App. (2d) Supp. 823, 825-826; *Kee v. Becker,* 54 Cal. App. (2d) 466, 470.

have no application *in* the open sea. To negative the inference that ownership stopped where the rule of Thalweg ceased to be applicable the Court held (p. 52):

> "The maritime belt is that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian States, which can exclusively reserve the fishery within their respective maritime belts for their own citizens, whether fish, or pearls, or amber, or other products of the sea. See *Manchester v. Massachusetts*, 139 U.S. 240; *McCready v. Virginia*, 94 U.S. 391."

109

It is important to note that the Court cited the *Manchester* and *McCready* cases. Plaintiff has insisted that the *McCready* case applies only to "inland waters." If so, it is pertinent to ask why this Court cited it in support of the statement above quoted. The answer is plain. The Court was referring to the basic principle set forth in the *McCready* case, namely, that

> "each State owns the beds of all tide waters within its jurisdiction, . . . " (94 U.S. 391, 394.)

thus demonstrating that the Court was of the view that this principle applies as well to the maritime belt as to "inland waters."

That the Court intended to hold that the State owned this maritime belt is further evidenced by the following excerpt (pp. 52-53):

> "Islands formed by alluvion were held by Lord Stowell, in respect of certain mud islands at the mouth of the Mississippi, to be 'natural appendages of the coast on which they border, and from which indeed they are formed.' *The Anna* (1805), 5 C. Rob. 373."

The Court did say in this case that it was unnecessary to determine "the breadth of the maritime belt," but it did not say that it was unnecessary to determine that the States owned such a belt, and the case does determine that precise question. This is further borne out by the decree, which reads, in part (pp. 58-59):

> "It is further ordered, adjudged and decreed that the State of Mississippi, its officers, agents and citizens, be and they are hereby enjoined and restrained from *disputing the sovereignty and ownership of the State* of Louisiana in *the land and water territory* south and west of said boundary line as laid down on the foregoing map."

110

The effect of the decision was to uphold the statute of Louisiana which applied to "Louisiana waters." If Louisiana had not owned the soil beneath the waters along her coasts, this statute excluding non-residents from taking oysters would not have been valid. This Court has held that the right of a State to exclude non-residents from taking fish from its waters is predicated on ownership of the soil.[81] In other words, if the soil under the marginal sea had been owned by the United States, the privileges and immunities clause in the Constitution would have prevented Louisiana from reserving the oyster beds and other products of the soil for her own citizens. The same principles must apply to minerals.

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[81] *Smith v. Maryland*, 18 How. 71 (1855); *McCready v. Virginia*, 94 U.S. 391 (1876); *Manchester v. Massachusetts*, 139 U.S. 240 (1891).

(d) ILLINOIS CENTRAL R. R. CO. v. ILLINOIS, 146 U.S. 387 (1892).

This case involved the waters of Lake Michigan within the boundaries of that State. The Court held that the States have title to the bed of the sea, and that the Great Lakes are "open seas." On this ground it was held that Illinois owned the bed of Lake Michigan. The case is, therefore, in effect, a decision on the ownership of the beds of the open sea within the boundaries of a State.
111 The Court held (pp. 435-437):

> "It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by *tide waters, within the limits of the several States,* belong to the respective States within which they are found, . . . *Pollard's Lessee v. Hagan,* 3 How. 212; *Weber v. Harbor Commissioners,* 18 Wall. 57.
>
> "The same doctrine is in this country held to be applicable to lands covered by fresh water in the Great Lakes over which is conducted an extended commerce with different States and foreign nations. *These lakes possess all the general characteristics of open seas,* except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In other respects they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the State of lands *covered by tide waters* that is not equally applicable to its ownership *of and dominion and sovereignty over lands covered by the fresh waters of these lakes.*"

(e) MASSACHUSETTS v. NEW YORK, 271 U.S. 65 (1926).

This case, from which we have already quoted (*supra,* pp. 32, 68), holds that the State of New York is the owner of the land in the bed of Lake Ontario within its boundaries. This ownership is equivalent in every respect to the ownership of lands in the open sea out to the State's boundary. If, as plainfiff asserts, it is necessary to the exercise of the Federal Government's powers of external sovereignty that it own the three-mile belt of the open sea, on the same reasoning it would be necessary for the Federal Government to own the bed of the Great Lakes to the international boundary line. The direct holding of this Court in the *Illinois* and *New York* cases com-
112 pletely destroy plaintiff's theory that ownership of the waters along the coasts of this nation has anything to do with the exercise by the Federal Government of its constitutional duties, either of national defense or otherwise. To the same effect see *United States v. Chandler-Dunbar Water Co.,* 209 U.S. 447 (1908), regarding the ownership by the State of waters in a river which forms the international boundary. (*Supra,* pp. 70-71.)

CALIFORNIA AND OTHER STATE COURT DECISIONS.

The California Supreme Court in *Boone v. Kingsbury,* 206 Cal. 148 (1929)[82] decided that the State of California was the owner of the submerged lands in the Pacific Ocean along the entire coast of California within the State's boundaries. In reliance upon the decisions of this Court in *Hardin v. Jordan,* 140 U.S. 371; *Shively v. Bowlby,* 152 U.S. 1 and *Illinois Central R.R. Co. v. Illinois,* 146 U.S. 387, the California court held (p. 190):

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[82] Certiorari denied, 280 U.S. 517.

"Such title to the shore and lands under water is regarded as incidental to the sovereignty of the State – a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fishery – cannot be retained or granted out to individuals by the United States. Such title being in the State, the lands are subject to State regulation and control, . . ."

113 A number of other California decisions have followed and applied the rule of *Boone v. Kingsbury* under the 1921 offshore leasing statutes.[83]

The Florida Supreme Court said in *Freed v. Miami Beach Pier Corporation*, 112 So. 841; 844 (1927), that:

"Upon the admission of the state of Florida . . . the lands within the territorial limits of the state below ordinary high-water marks of the ocean and gulf and other navigable waters became the property of the state by virtue of its sovereignty. See the Abby Dodge, 223 U.S. 166, 32 S. Ct. 310, 56 L. Ed. 390."

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83 *Kelley v. Kingsbury* (1930), 210 Cal. 37; *Joyner v. Kingsbury* (1929), 97 Cal. App. 17; *Carr v. Kingsbury* (1931), 111 Cal. App. 165; *Feisthamel v. Kingsbury* (1931), 111 Cal. App. 762; *Cummings v. Kingsbury* (1931), 111 Cal. App. 763; *Joyner v. Kingsbury* (1931), 111 Cal. App. 764; *Maggart v. Kingsbury* (1931), 111 Cal. App. 765; *Stone v. City of Los Angeles* (1931), 114 Cal. App. 192; *Farry v. King* (1932), 120 Cal. App. 118; *Hollister v. Kingsbury* (1933), 129 Cal. App. 420; *General Pet. Corp. v. Hobson* (D.C. Cal. 1927), 23 F. (2d) 349; *Bankline Oil Co. v. Comm.* (C.C.A. 9, 1937), 90 F. (2d) 899; *Helvering v. Bankline Oil Co.* (1938), 303 U.S. 362; *Spalding v. United States* (D.C. Cal. 1937), 17 Fed. Supp. 957; *Spalding v. U.S.* (C.C.A. 9, 1938), 97 F. (2d) 697; *Stockburger v. Jordan* (1938), 10 Cal. (2d) 636; *Miller v. Stockburger* (1938), 12 Cal. (2d) 440.

In 1931 the Florida Supreme Court said in *Lipscomb v. Gialourakis*, 133 So. 104, 106, that:

"All the bottoms of the gulfs and natural bays within the limits of the state of Florida passed to the State of Florida in its sovereign capacity when Florida was admitted into the Union."[84]

114 The New York Appellate Division in 1927 in *People ex rel. Mexican Telegraph Company v. State Tax Commission*, 220 N.Y.S. 8, 17, Note 10, said that:

"State owns land under water within three-mile limit."

In *People v. Reilly*, 14 N.Y.S. (2d) 589, 592 (Magistrates' Court 1939), the court said that:

"The State owns and has jurisdiction over all land under water within the three-mile limit. People *ex rel.* Mexican Tel. Co. v. State Tax Commissioner, 219 App. Div. 401, 220 N.Y.S. 8."

State v. Pollock, 239 Pac. 8, 10 (Wash. 1925), states that:

". . . the jurisdiction and dominion of the state extends to the three-mile limit offshore."[85]

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84 See also *Deering v. Martin* (Florida 1928), 116 So. 54, 61; *Perky Properties v. Felton* (Florida 1934), 151 So. 892, 895.

85 To the same effect: *Suttori v. Peckham* (1920), 48 Cal. App. 88; *Dunham v. Lamphere* (1855), 69 Mass. (3 Gray) 268. See *Commonwealth v. Boston Terminal Company* (Mass. 1904), 70 N.E. 125; *Pope v. Blanton* (1935, D.C. Fla.), 10 Fed. Supp. 18, dismissed for lack of jurisdiction 299 U.S. 521; *Bosarge v. State* (Alabama 1929), 120 So. 427, cert. den. 280 U.S. 568.

TREATISES.

2 *Lindley on Mines* (3d ed. 1914), Section 429, page 1016, states that:

> "When a state bordering upon these waters is admitted into the Union it becomes, by virtue of its sovereignty, the owner of all lands extending seaward so far as its municipal dominion extends, – . . . from
115 the line of ordinary high tide on the shore of the open ocean seaward to the distance of three miles, or a marine league."

2 Thornton, *Oil and Gas* (Willis, 5th ed. 1932), Section 476, page 979, states that:

> "Mineral beneath . . . the sea belongs to the State."

45 C.J., page 540, Note 78(b), states that:

> "Within the three-mile limit, a state owns land submerged by the sea."

27 *Ruling Case Law*, page 1358, states that:

> Under the common law of England the title to the bed of the sea below high water mark . . . was in the Crown. . . . In the United States the several states have succeeded to all the right of the Crown and Parliament in the soil under navigable tide waters, and each, subject to limitations to be found in the federal constitution, has the ownership and control of all the navigable waters and the bed thereof within its limits."

Tiffany, *Real Property* (3d Ed., 1939), Vol. 3, p. 638:

> "The land under navigable waters within the limits of the territory ceded to the United States, either by one of the states or by a foreign country, passed to

> the United States for the benefit of the whole people, and in trust for the several states to be ultimately created out of such territory, and, upon
116 the admission of any part of such territory as a state, such lands pass *ipso facto* to the state government, . . ."

Gould, *Waters* (2nd Ed., 1891), p. 75:

> "At the time of the Revolution, when the people became sovereign, the respective States succeeded to the title of the Crown in the tide waters within their territorial limits, . . ."

Angell, *Tide Waters* (2nd Ed., 1847), pp. 55, 53, 57:

> "The original states, in virtue of their royal charters, are entitled to the navigable waters within their territory, . . ."
>
> "The next question is, whether the *new* states of the Union, or those which have been admitted since the revolution, stand upon the same footing as the *original* states; or whether the sovereign right of property in the tide waters within the jurisdictional limits of a new state, is transferred to the state government, or remains in the general government."
>
> ". . . the shores of navigable waters, and the soil under them, were not granted by the constitution to the United States, but were reserved to the states respectively; and . . . the *new* states have the same rights, sovereignty and jurisdiction over the subject as the *original* states."[86]

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86 Italics in Angell.

I. RULE OF PROPERTY.

1. Rationale of the Rule of State Ownership.

117 It must be strikingly apparent from the numerous cases already cited that the courts have never predicated property rights or governmental powers upon any distinction as between "inland waters" (including bays, harbors and waters between high and low tide) on the one hand and the marginal sea on the other.

The reason no such distinction was ever made is that the rationale of the principle of State ownership is the same as to all navigable waters within the State's boundary. Navigability is the sole criterion. Navigability is not dependent on whether the waters are salt or fresh, or whether they are land-locked or in the open sea below low-water mark.

This principle is graphically illustrated in the case of *Barney v. Keokuk*, 94 U.S. 324 (1876), a case involving the bed of the Mississippi River. Regarding the title to the bed of that river, and particularly to accretions which attached to land on a navigable river, this Court said (pp. 337-8):

> ". . . By the common law, as before remarked, such additions to the land on navigable waters belong to the crown; but as the only waters recognized in England as navigable were tide-waters, the rule was often expressed as applicable to tide-waters only, although *the reason of the rule* would equally apply to navigable waters above the flow of the tide; that reason being, that the public authorities ought to have entire control of the great passageways of commerce and navigation, to be exercised for the public advantage and convenience.

> . . . In our view of the subject the correct principles were laid down in *Martin v. Waddell*, 16 Pet.
118 367; *Pollard's Lessee v. Hagan*, 3 How. 212, and *Goodtitle v. Kibbe*, 9 *id.* 471. These cases related to *tide-waters*, it is true; but they enunciate principles which are equally applicable to *all navigable waters*."

It will be seen that the rule of State ownership is based *solely* on the ground that the waters are navigable, not on the character of the waters as "inland waters" or waters of the sea.

This rationale is further elaborated by this Court in the case of *Illinois Central R.R. Co. v. Illinois*, previously discussed. The Court held (146 U.S. 387, 435-437):

> "It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by *tide waters, within the limits of the several States*, belong to the respective States within which they are found, . . . *Pollard's Lessee v. Hagan*, 3 How. 212; *Weber v. Harbor Commissioners*, 18 Wall. 57.
>
> "*The same doctrine* is in this country held to be applicable to lands covered by fresh water in the Great Lakes . . . and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the State of lands *covered by tide waters* that is not equally applicable to its *ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes*. . . .
>
> ". . . by the common law, the doctrine of the dominion over and ownership by the crown of lands *within the realm under tide waters* is not founded

upon the existence of the tide over the lands, but upon the fact that the waters *are navigable*, . . ."

119 Plaintiff concedes that the language employed by this Court in its decisions, is

> "susceptible of an interpretation that would include lands under the marginal sea." (Br. p. 155.)

However, plaintiff attempts to explain away this language on the ground that it was "probably merely fortuitous," by which we assume plaintiff means it was a mere accident that the Court repeatedly said that the States were the owners of the lands beneath all navigable waters within their boundaries.

Even if it could be assumed that an accident such as this could happen consistently in dozens of decisions over a period of one hundred years, still that argument ignores the fact that the court was in each instance stating *the rationale of the rule of State ownership of lands beneath navigable waters*– and the rationale is the same for both "inland waters" and marginal sea. The court was therefore setting forth in each case a general principle which required only specific application to the particular facts before the Court. This being so, it is entirely erroneous to say that this language was careless or fortuitous *obiter dictum*. The truth is that it was the basic principle upon which State ownership in each case had to be predicated.

It is a well settled rule of law in this Court that the considered enunciation of a principle of law upon which a decision is based does not constitute *obiter dictum*. (See cases cited *infra*, p. 128 *et seq.*)

It is also well settled that the repeated expression of a general principle upon which titles to property have become predicated constitutes a rule of property of the kind

which this Court has consistently, throughout its history, declined to overrule. (See cases *infra*, pp. 130-137.)

120 We desire at this point to set forth in skeleton form a series of pronouncements on this subject by this Court which demonstrate that the rule of State ownership has been adopted by this Court as a fundamental principle of public law which has become a rule of property.

It is important to notice that in each of the quotations two elements are expressly or impliedly present. One, the factor of navigability, and the other that State ownership is co-extensive with the jurisdiction (boundaries) of the State.

2. Supreme Court Cases.

Chief Justice Taney, in 1842 in the first case establishing the rule, said:

> "For when the Revolution took place the people of each State became themselves sovereign, and in that character hoid the abolute right to all their navigable waters and the soils under them. . ."[87]

Mr. Justice McKinley in 1845 said:

> "First, the shores of navigable waters, and the soils under them, were not granted by the constitution to the United States, but were reserved to the states respectively. Secondly, the new states have the same rights, sovereignty, and jurisdiction over the subject as the original states."[88]

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87 *Martin v. Waddell* (1842), 16 Peters 367, 410.

88 *Pollard v. Hagan* (1845), 3 How. 212, 229.

Mr. Justice Clifford in 1867 said:

> "Settled rule of law in this court is, that the shores of navigable waters and the soils under the same in the original states were not granted by the Constitution to the United States, but were reserved to the several states, and that the new
121 states since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original states possess within their respective borders. When the Revolution took place, the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters and the soils under them. . . ."[89]

Mr. Justice Field in 1873, for a unanimous court that included Chief Justice Chase, said

> "all soils under the tide waters within her limits passed to the State";[90]

Mr. Justice Bradley in 1876 said:

> "In our view of the subject the correct principles were laid down in Martin v. Waddell, 16 Pet. 367, Pollard's Lessee v. Hagan, 3 How. 312, and Goodtitle v. Kibbe, 9 How. 471. These cases related to tidewaters, it is true; that they enunciated principles which are equally applicable to all navigable waters . . . it [the bed and shore of such waters] properly belongs to the State by their inherent sovereignty. . ."[91]

89 *Mumford v. Wardwell* (1867), 6 Wall. 423, 436.

90 *Weber v. Harbor Commissioners* (1873), 18 Wall. 57, 66.

91 *Barney v. Keokuk* (1876), 94 U.S. 324, 336.

Chief Justice Waite in 1876 said:

> ". . . each State owns the beds of all tide-waters within its jurisdiction . . .";[92]

Mr. Justice Field in 1891 said:

> ". . . the titles acquired by the United States to lands in California under tide-waters, from Mexico, were held in trust for the future State, so that their
122 ownership and right of disposition passed to it upon its admission into the Union, . . ."[93]

Mr. Justice Lamar in 1891 said:

> "It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original States were reserved to the several States and that the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original States possess within their respective borders."[94]

Mr. Justice Gray in 1894 said:

> "The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdictions."[95]

92 *McCready v. Virginia* (1876), 94 U.S. 391, 394.

93 *San Francisco v. Leroy* (1891), 138 U.S. 656, 670-671.

94 *Knight v. United States Land Association* (1891), 142 U.S. 161, 183.

95 *Shively v. Bowlby* (1894), 152 U.S. 1, 57.

Mr. Justice Holmes in 1903 said:

> ". . . the grounds for the decision must be quite different from the considerations affecting the conveyance of land bounded on navigable water. In the latter case the land under the water does not belong to the United States, but has passed to the State by its admission to the Union."[96]

Chief Justice Fuller in 1906 said:

> "the maritime belt is that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian States which can exclusively reserve the fishery within their respective maritime belts for their own citizens, whether fish, or pearls,
123 or amber, or other products of the sea";[97]

Mr. Justice Holmes in 1908 said:

> "The right of the State to grant lands covered by tide waters or navigable lakes and the qualifications, as stated in Shively v. Bowlby, 152 U.S. 1, 47, are that the State may use or dispose of any portion of the same 'when that can be done without substantial impairment of the interest of the public in such waters, . . .,"[98]

Chief Justice White said in 1912:

> "each State owns the beds of all tide-waters within its jurisdiction";[99]

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96 *Hardin v. Shedd* (1903), 190 U.S. 508, 519.

97 *Louisiana v. Mississippi* (1906), 202 U.S. 1, 52.

98 *United States v. Chandler-Dunbar Water Power Co.* (1908), 209 U.S. 447, 451.

99 *Abby Dodge* (1912), 223 U.S. 166, 174.

Mr. Justice Brandeis in 1921 said:

> ". . . Washington became . . . the owner of the navigable waters within its boundaries and of the land under the same."[100]

Chief Justice Taft in 1926 said:

> "all the proprietary rights of the Crown and Parliament in, and all their dominion over, lands under tidewater vested in the several states;"[101]

124 Chief Justice (then Mr. Justice) Stone in 1935 said that:

> "lands underlying navigable waters within the States passes to [the States];"[102]

Chief Justice Hughes said in 1935:

> "The soils under tidewaters within the original states were reserved to them respectively, and the states since admitted to the Union have the same sovereignty and jurisdiction in relation to such lands within their borders as the original states possessed;"[103]

Chief Justice Hughes in 1935 said:

> "Pollard v. Hagan, 3 How. 212, Shively v. Bowlby, 152 U.S. 1, and Port of Seattle v. Oregon-Washington R. Co., 255 U.S. 56, dealt with the title of the

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100 *Port of Seattle v. Oregon & W.R.R. Co.* (1921), 255 U.S. 56, 63.

101 *Appleby v. New York* (1926), 271 U.S. 364, 381.

102 *United States v. Oregon* (1935), 295 U.S. 1, 14.

103 *Borax Consolidated v. Los Angeles* (1935), 296 U.S. 10, 15.

States to tidelands *and the soil under navigable waters within their borders.* See Borax Consolidated v. Los Angeles, 296 U.S. 10, 15."[104]

The rule has been stated in substantially the same words by more than 25 other justices of this Court over a period of the last 100 years,[105] as well as by numerous judges of

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104 *Ashwander v. Tennessee Valley Authority* (1936), 297 U.S. 288, 337.

105 *Goodtitle v. Kibbe* (1850, Taney, C.J.), 9 How. 470, 477;
Den v. Jersey Company (1853, Taney, C.J.), 15 How. 426, 432-433;
Smith v. Maryland (1855, Curtis, J.), 18 How. 71, 74;
County of St. Clair v. Lovingston (1874, Swayne, J.), 90 U.S. 46, 68;
City of Hoboken v. Penn. R. Co. (1888, Mathews, J.), 124 U.S. 656, 688;
Manchester v. Massachusetts (1890, Blatchford, J.), 139 U.S. 240, 256;
Hardin v. Jordan (1891, Bradley, J.), 140 U.S. 371, 381;
Illinois Central Railroad v. Illinois (1896, Field, J.), 146 U.S. 387, 485;
St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners (1897, Peckham, J.), 168 U.S. 349, 365;
Mobile Transportation Co. v. Mobile (1903, Brown, J.), 187 U.S. 479, 482;
United States v. Mission Rock Co. (1903, McKenna, J.), 189 U.S. 391, 392;
Scott v. Lattig (1913, Van Devanter, J.), 227 U.S. 229, 243;
Donnelly v. United States (1913, Pitney, J.), 228 U.S. 243, 261;
Greenleaf Lumber Co. v. Garrison (1915, McKenna, J.), 237 U.S. 251, 259;
United States v. Coronado Beach Co. (1921, Holmes, J.), 255 U.S. 472, 487;
Brewer-Elliott Oil Co. v. United States (1922, Taft, C.J.), 260 U.S. 77, 85; (continued)

125 the lower Federal Courts.[106]

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105 (continued)
Oklahoma v. Texas (1922, Van Devanter, J.), 258 U.S. 574, 583;
United States v. Holt Bank (1926, Van Devanter, J.), 270 U.S. 49, 54;
Massachusetts v. New York (1926, Stone, J.), 271 U.S. 65, 89);
Fox River Company v. Railroad Commission (1927, Stone, J.), 274 U.S. 651, 655;
United States v. O'Donnell (1938, Stone, J.), 303 U.S. 501, 519.

106 *Spalding v. United States* (D.C. Cal., 1937), 17 Fed. Supp. 966, affirmed (C.C.A. 9) 97 F. (2d) 701, involving California submerged land lease No. 92, held by Pacific Western Oil Corporation; *Spalding v. United States* (D.C. Cal., 1937), 17 Fed. Supp. 957, involved California submerged land lease No. 93, in which Pacific Western Oil Corporation held an interest. These areas are described in the Complaint of the United States in the instant proceeding and extend 3/4 of a mile into the Pacific Ocean and Santa Barbara Channel. In referring to these submerged land areas located in the Pacific Ocean and Santa Barbara Channel, the District Court there said:

"The tidelands of California are held by the State in trust for the people for the purpose of navigation, commerce and fishery. The Constitution of California, art. 15, sec. 2; Borax Consolidated v. Los Angeles (1935), 296 U.S. 10. . .; Illinois Central Railroad Company v. Illinois (1892), 146 U.S. 387, 452, . . . Boone v. Kingsbury (1928), 206 Cal. 148.

"While the State is prohibited from alienating the tidelands . . . , general leasing statutes allowing their leasing exist. . . ." Affirmed (C.C.A. 9), 97 F. (2d) 697, cert. den. 305 U.S. 644.

Bankline Oil Company v. Commissioner, 90 F. (2d) 899 (C.C.A. 9, 1937), affirmed in part 303 U.S. 362, involved California submerged land lease No. 89 in the Elwood Oil Field, being a lease extending 3/4 of a mile into the Pacific Ocean and Santa Barbara Channel. The Circuit Court of Appeals there said (90 F. (2d) 900):
(continued)

126 Thus, for a period of more than 100 years this Court, in determining questions of the ownership of submerged lands, has consistently used language expressly including all lands under navigable waters within the respective boundaries of the States. And during this entire period of time, *no Justice of this Court has dissented from any of the decisions on the ground that the language used was too broad a statement of the governing principle.* Furthermore, many of the decisions in which this principle has been enunciated are among the most carefully considered cases in the history of the Supreme Court.

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106 (continued)

"The State of California holds the tidelands within its boundaries in its sovereign capacity in trust 'for the people of the State . . .' *Boone v. Kingsbury*, 206 Cal. 148, 183. . . . The petitioner's lease was granted pursuant to the Statutes of California, 1921, C. 303, P. 404, entitled, 'An Act to reserve all minerals in State lands,' etc. By this Act, the State has reserved the mineral deposits in all lands belonging to the State. . . . One of the purposes of the aforesaid Act . . . is to . . . '. . . reduce to useful purposes oil, gas and mineral deposits *reposing beneath the Ocean's bed.*' Boone v. Kingsbury, 206 Cal. 148, 181."

McCloskey v. Pacific Coast Co. (C.C.A. 9, 1908), 160 Fed. 794, 796:

"The common law has, by act of Congress, been declared to be in force in the territory of Alaska. By the common law of England, the King was the owner of the bed of the ocean and of everything below the line of ordinary high tide. . ."

Dean v. City of San Diego (D.C. Cal., 1925), 275 Fed. 228, 231.

Pope v. Blanton (D.C. Fla., 1935), 10 F. Supp. 18, reversed on another point, 299 U.S. 521.

U.S. Ex. No. 9

Appendices A to I to Brief for the State of California in Opposition to Motion for Judgment

* * *

50 2. The English Common Law Authorities After 1776 Confirm the Crown's Title to the Bed of the Marginal Sea.

After 1776 neither the English courts nor the English text writers departed from the basic principles laid down by Callis and Hale as to the Crown's ownership, subject always to the public rights of navigation and fishing, of the bed of the sea, of arms of the sea and navigable rivers so far as the tide flows and reflows, and of the foreshore bordering on such waters. With the development of the cannon-shot rule in international law, which began to be
51 recognized by the English Admiralty Courts by 1760,[30] the common law cases began to place the outer limit of the Crown's ownership of the sea bed at the distance of a cannon-shot or three miles from low-water mark. But that international law doctrine had no effect whatever upon the internal common law of England as to the ownership of the submerged lands within that limit.

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30 In 1760, the High Court of Admiralty in England decided that a captured French vessel was not good prize because taken within a port of the King of Spain "within reach of his cannon." *The De Fortuyn* (1760), *Marsden's Admiralty Cases*, p. 175. And see *The Twee Gebroeders*, 3 C. Rob. 162, 165 Eng. Rep. 422 (1800), where it was held that the capture of Dutch ships by an English ship effected within three miles of the Prussian coast, Prussia being neutral, was made within the limits to which neutral immunity was conceded, *The Anna*, 5 C. Rob. 373, 165 Eng. Rep. 809 (1805), where it was held that a capture made by a British ship

(Continued)

(a) THE CASES.

The continuity in the common law from the Sixteenth Century to the Twentieth is perfectly demonstrated by the application, in 1916, of the principles announced by Hale and Callis to the question of the ownership of the bed of the open sea near the coast of India. In the case of *Secretary of State for India v. Chelikani Rama Rao*, 43 L.R. Ind. App. 192 (1916), (a case which is given only the most cursory mention by counsel for the plaintiff),[31] the Judicial Committee of the Privy Council, the highest court in the British Empire for the determination of questions arising in the dominions and colonies, held squarely that islands formed on the bed of the sea within three miles of the coast of India belonged in property to the British Crown. In delivering the unanimous judg-
52 ment of the court, Lord Shaw of Dunfermline said (pp. 189-199):

> "Upon the undisputed facts as to the formation of these islands in the sea and in the situation described, the case would appear to be the ordinary one described by Hale, 'De Jure Maris.' He describes how 'the king hath a title to *maritima incrementa* or increase of land by the sea; and this is of three kinds, viz.:–
>
> '1. Increase *per projectionen vel alluvionem.*
>
> '2. Increase *per relictionem vel desertionem.*
>
> '3. *Per insulae productionem.*'

30 (Continued) within three miles of certain mud islands off the mouth of the Mississippi River was made within the boundaries of the United States, a neutral nation. (It is to be noted that the coast at that point was then a part of the Louisiana Territory, the State of Louisiana not yet having been admitted into the Union.)

31 Plaintiff's Br. pp. 45, 50, 115.

> "The lands in dispute fall under the third catetory, which is thus dealt with by Hale:–
>
> " '3. The third sort of maritime increase are islands arising *de novo* in the king's seas, or the king's arms thereof. These upon the same account and reason *prima facie* and of common right belong to the king; for they are part of that soil of the sea, that belonged before in point of propriety to the king; for when islands *de novo* arise, it is either by the recess or sinking of the water, or else by the exaggeration of sand and slubb, which in process of time grow firm land environed with water'."

It is plain that the court did not consider that it was applying any new doctrine based upon any recently developed rules of international law, for not only did the court rely upon Lord Hale but it also stated (p. 199):

> "The date of formation of these islands is not certain. Plans have been produced showing that from the forties to the sixties of last century they or the larger part of them appeared above the surface of the water.
> 53 *At what date soever they appeared*, they were in the high seas at a point thereof not far from the shore of the mainland, and in these circumstances, in the opinion of the Board, they were Crown property.
>
> "The case is not complicated by any point as to geographical situation, or by the question whether a limit from the shore seawards should be beyond three miles, should be the extreme range of cannon fire, or should be even more if the *locus* be claimed to be *intra fauces terrae* – no such questions arise here. The point is geographically within even three miles of British territory; at that point islands have arisen from the sea. Are those islands no man's land?

> The answer is, they are not; they belong in property to the British Crown."

No clearer answer to the contentions of the plaintiff in this case could be formulated.

The common law principles relied on by Lord Shaw in the *Secretary of State for India* case were repeatedly applied and confirmed by the English courts between 1776 and 1916.

The first case dealing with the subject that arose after 1776 was *Blundell v. Catterall*, 5 B. & Ald. 268, 106 Eng. Rep. 1190 (1821). All four of the judges who wrote opinions relied upon the authority of Lord Hale, with respect not only to the ownership of submerged lands by the Crown but also to the public trusts to which that ownership is subject. Holroyd, J., said in his opinion:

> ". . . as he [Hale] also there lays it down, in the main sea itself, adjacent to his dominions, the
54 King only hath the propriety, but a subject hath not . . .
>
> * * * * * * *
>
> "By the common law, though the shore, that is to say the soil betwixt the ordinary flux and reflux of the tide, *as well as the sea itself, belongs to the King;* yet it is true that the same are also *prima facie publici juris,* or clothed with a public interest. But this *jus publicum* appears from Lord Hale to be the public right in all the King's subjects, of navigation for the purposes of commerce, trade, and intercourse; and also the liberty of fishing in the sea or the creeks or arms thereof . . ." (106 Eng. Rep. at 1199.)

Here it will be seen that the English court was not announcing any new doctrine but was simply applying the settled common law on the authority of Lord Hale. The fact that there were no court decisions between 1768 (*Carter v. Murcot, supra*) and this case did not mean that there was a hiatus in the law during that period.

In *Rex v. Lord Yarborough*, 3 B. & C. 91, 5 Bing 163, 1 Eng. Rul. Cas. 458 (1828), the old principles of Callis and Hale were reaffirmed by Best, C.J., speaking the unanimous opinion of the eleven judges who heard the case in the House of Lords, as follows:

> "All the writers on the law of England agree in this: that as the King is lord of the sea that flows around our coasts, and also owner of all the land to which no individual has acquired a right by occupation and improvement, the soil that was once covered by the sea belongs to him." (1 Eng. Rul. Cas. at 471.)

55 In 1829 in the case of *Benest v. Pipon*, 1 Knapp 60, 12 Eng. Rep. 243, the Privy Council considered the property right to cut sea-weed (vraic) growing on the rocks called "L'Isle Percee" which were located in a bay on the Isle of Jersey. Lord Wynford, speaking for the court, said (12 Eng. Rep. at 246-247):

> *"The sea is the property of the King, and so is the land beneath it,* except such part of that land as is capable of being usefully occupied without prejudice to navigation, and of which a subject has either had a grant from the King, or has exclusivity used for so long a time as to confer on him a title by prescription: . . . This is the law of England and the cases referred to prove that it is the law of Jersey . . .

This rule of law is derived from a universal principle of convenience and justice. *What never has had an individual owner belongs to the Sovereign within whose territory it is situated. . . .*

"The Islands of Jersey and Guernsey were parts of the duchy of Normandy. The laws of Normandy were introduced into this kingdom by William the First, and superseded the Saxon laws, which before that period were the laws of England. This circumstance accounts for the laws of England and Jersey being precisely the same with regard to *land that is below the ordinary tides, dealing with such land as a part of the bottom of the sea, and vesting the original right to it in the King.*"

This decision conclusively negatives plaintiff's theory that property rights in the marginal sea "emerged" under international law after 1776. Such rights have existed in the sovereign continuously since 1066.

56 In *Attorney-General v. Chambers,* 4 De G. M. & G. 206, 43 Eng. Rep. 486 (1854), the Attorney General filed an information against the owners and lessees of a certain district abutting on the seashore in the County of Carmathen, alleging that by royal prerogative, all mines and minerals lying under the sea, seashore and arms of the sea, belonged and had at all times belonged to the Kings and Queens of England. The Court's decision was premised upon the following statement of Mr. Baron Alderson (43 Eng. Rep. at 489):

> "The Crown is clearly in such a case, according to all the authorities, entitled to the 'littus maris' *as well as to the soil of the sea itself adjoining the coasts of England.*"

In *Attorney-General v. Hanmer,* 4 Jur. N.S. 751 (1858), a case in Vice-Chancellor Stuart's Court involving the construction of a royal grant of coal mines, Mr. Baron Watson, speaking for the court, relied on Lord Hale as follows (p. 753):

> "Lord Hale says that the main sea is the waste and demesne of the kings of England, and the king is the owner of that great waste the sea."

In 1858 an arbitration proceeding was conducted to determine the respective property rights of the Queen of England and the Prince of Wales, who was also Duke of Cornwall, in minerals lying under the seashore of the Duchy of Cornwall both above and below low water-mark.[32] The arbitrator, Sir John Patteson, decided that the right to all mines and minerals lying below low water-mark under the open sea adjacent to the County of Cornwall was vested
57 in the Queen, although the Duke was in fact the first occupier of those mines and it was contended for the Duke that he owned them as first occupier. The argument for the Queen, however, was founded on the proposition that the bed of the sea below low water-mark belonged in property to the Crown,[33] and such was the decision of the arbitrator. The arbitrator's decision was confirmed

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[32] See Plaintiff's Br. pp. 45-47.

[33] See opinion of Lord Coleridge, C.J. in *The Queen v. Keyn,* L.R. 2 Exch. Div. 63 at 155-158 (1876). Lord Chancellor Cranworth was counsel for the Crown in this arbitration, having then recently participated in the decision in *Attorney-General v. Chambers, supra.* Callis, Selden, Hale and other common law authorities reviewed above were presented to the arbitrator, Sir John Patteson, and in his award he stated that he had reviewed them carefully in

(Continued)

and ratified by Parliament in the Cornwall Submarine Mines Act, 1858, 21-22 Vict., Ch. 109, which declared that the mines and minerals lying below-water mark under the open sea were vested in the Queen in right of her Crown *"as part of the soil and territorial possessions of the Crown."* In the words of Lord Chief Justice Coleridge, "Parliament did but apply . . . that which is and always has been the law of this country."[34]

In *Gammell v. Her Majesty's Commissioners of Woods and Forests,* 3 Macqueen's Appeals 419 (1859), the House
58 of Lords held that the salmon fisheries in the open sea around the coast of Scotland, unless parted with by grant, belong exclusively to the Crown and formed part of its hereditary revenue. In speaking of the limits of the fisheries in question, Lord Wensleydale said (pp. 465-466):

> " * * * it would be hardly possible to extend it seaward beyond the distance of three miles, which by the acknowledged law of nations, belongs to the coast of the country, that which is under the dominion of the country by being within cannon range, and so capable of being kept in perpetual possession."

In *The Free Fishers and Dredgers of Whitstable v. Gann,* 20 C.B. (N.S.) 1, 144 Eng. Rep. 1003 (1865), Lord Chelmsford in the House of Lords quoted with approval the following statement of Lord Chief Justice Erle of the Common Pleas in his opinion on the case in the lower court (144 Eng. Rep. at 1011-1012):

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[33] (Continued) formulating his conclusions. Copies of the submission, briefs and award in the Cornwall Mines Arbitration are lodged, concurrently herewith, with the Clerk for the convenience of the Court.

[34] In *The Queen v. Keyn,* L.R. 2 Exch. Div. 63, at 158 (1876).

> "The soil of the sea-shore to the extent of three miles from the beach is vested in the Crown * * * ."

In *Ipswich Dock Commissioners v. Overseers of the Parish of St. Peter, Ipswich,* 7 B. & S. 310 (1866), the Exchequer Chamber through Blackburn, J., said (p. 344):

> "In *Reg. v. Musson* it was rightly decided that what Lord Hale calls the main sea is *prima facie* extra-parochial, and in the absence of evidence that it forms part of a parish it must be taken that it does not; and the same reason, that it is part of the waste and demesnes and dominions of the Crown, would apply to an estuary
59 or arm of the sea; it is a part of the great waste, both land and water, of which the king is lord."

In *Murphy v. Ryan,* Jr. R. 2 C.L. 143 (1868), the court said through O'Hagan, J. (p. 149):

> "But whilst the right of fishing in fresh water rivers, in which the soil belongs to the riparian owners, is thus exclusive, the right of fishing in the sea, and in its arms and estuaries, and in its tidal waters, wherever it ebbs and flows, is held by the common law to be *publici juris,* and to belong to all the subjects of the Crown–*the soil of the sea, and its arms and estuaries, and tidal waters being vested in the Sovereign as a trustee for the public."*

In *Lord Advocate v. Trustees of the Clyde Navigation,* 19 Rettie 174 (1891), the Court of Session of Scotland held through Lord Kyllachy (p. 177);

> " * * * there is *no distinction* in legal character between the Crown's right in the foreshore, in tidal and navigable rivers, *and in the bed of the sea within three miles of the shore.* In each case it is of course a right largely qualified by public use. * * *

but nonetheless is it, in my opinion, a proprietary right * * * ."

In the same case, Lord Young said (p. 183):

" * * * I have no objection to indicate my own view * * * that the Crown has a right of property within the three mile limit."

60 Again the three mile doctrine shows its influence, but only as a seaward boundary for rights already well established and unaltered in quality.

In *Lord Advocate v. Weymss,* 1900 A.C. 48 (1899), the House of Lords, through Lord Watson, said (p. 66);

"I see no reason to doubt that, by the law of Scotland, the solum underlying the water of the ocean, whether within the narrow seas, or from the coast outward to the three mile limit, and also the minerals beneath it, are vested in the Crown * * *."[35]

In *Lord Fitzhardinge v. Purcell* (1908), 2 Ch. 139, the court treated tidal rivers and the bed of the sea alike. Parker, J. said (p. 166):

"Clearly the bed of the sea, at any rate for some distance below low-water mark, and the beds of tidal navigable rivers, are *prima facie* vested in the Crown, and there seems no good reason why the ownership thereof

35 Quoted with approval by Lord Shaw in *Secretary of State for India v. Chelikani Rama Rao,* 43 L.R. Ind. App. 192 (1916), discussed *supra,* pp. 51-53. Lord Shaw said of the *Wemyss* case (p. 201): "The action had reference to the ownership of minerals in the bed of the sea and below low-water mark. This, of course, was entirely a question, not as to rights upon or over that portion of the bed of the sea, but as to the actual ownership of the corpus or thing itself – of which corpus the minerals formed a part."

by the Crown should not also, subject to the rights of the public, be a beneficial ownership."[36]

61 During the period since 1776 the English cases have followed Digges' principle that the Crown *prima facie* owns the foreshore between the high-and low-water marks, subject to the public right of navigation and fishing.[37] It is clear that the development of the Crown's right to the foreshore, which plaintiff apparently concedes to have been established in 1776, did not precede the establishment of the Crown's right to the bed of the sea. On the contrary, the establishment of the Crown's *prima facie* right to the foreshore under Digges' doctrine was developed from the earlier doctrine of the Crown's ownership of the bed of the sea.

36 Quoted with approval by Lord Shaw in *Secretary of State for India v. Chelikani Rama Rao,* 43 L.R. Ind. App. 192 (1916), discussed *supra,* pp. 51-53. Lord Shaw said of this case (p. 200): "It is true that the case cited dealt merely with the right of fowling, but it was necessary in the determination of that right to settle the true nature of the right in the land itself."

37 Cases dealing with the ownership of the foreshore are *Attorney-General v. Richards,* 2 Anst. 603, 145 Eng. Rep. 980 (1794); *Attorney-General v. Parmeter,* 10 Price 378, 147 Eng. Rep. 345 (1811); *Attorney-General v. Johnson,* 2 Wilson Ch. 87, 37 Eng. Rep. 240 (1819); *Blundell v. Catterall,* 5 B. & Ald. 268, 106 Eng. Rep. 1190 (1821); *Smith v. Earl of Stair,* 6 Bell App. Cas. 487 (House of Lords, 1849); *Attorney-General v. Chambers,* 4 De G. M. & G. 206, 43 Eng. Rep. 486 (1854); *The Queen v. Musson,* 8 El. & Bl. 899, 120 Eng. Rep. 336 (1858); and *Attorney-General v. Emerson,* L.R. [1891] A.C. 649.

(b) TREATISES.

The doctrine of the common law cases cited above is likewise reflected in treatises on the English common law written since 1776. Henry Schultes in his *Essay on Aquatic Rights* (London, 1811), stated the law to be substantially as laid down by Lord Hale more than a century before him. Schultes said (pp. 109-110):

> "By the common law, the king hath the sovereign dominion over the sea adjoining the coasts, and over the navigable rivers; and hath also the right of property in the soil thereof, and is consequently entitled
62 to all *maritima incrementa.* But the crown has not an exclusive right of fishery, nor can it grant an exclusive right to another . . . The sea and navigable streams are public for all the king's subjects to fish indiscriminately, without interruption of common right."

Chitty[38] in his *Prerogatives of the Crown* (London, 1820), stated (p. 173):

> "Under this head it may also be mentioned, that the King possesses the *sovereign dominion* in all the narrow seas, that is, the seas which adjoin the coasts of England, and other seas within his dominions. This prerogative power is vested in the King, as the protector of his people, and guardian of their rights. It is subservient, however, to those *jura communia,* which nature and the principles of the constitution reserve for his Majesty's subjects. It can neither prevent them from trading or fishing."

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38 Chitty was one of the most famous editors of *Blackstone's Commentaries.*

Joseph K. Angell, in his *The Right of Property in Tide Waters,* published in 1826 (an American work which is mentioned here because it deals largely with the common law of England), said (pp. 17-18):

> "In this respect, it will appear, that the Roman law has been very much surpassed, by the common law of England. For although, as will presently be shewn, the sea, &c. according to the provisions of the common law, are as public and common, as they were among the Romans; yet it is not only the policy of the common law to assign to every thing capable of occupancy and susceptible of ownership a legal and certain proprietor – but also to make those things which from their nature cannot
63 be *exclusively* occupied and enjoyed, the property of the *sovereign.*

* * * * * * *

> "To the king, therefore, is not only assigned the sovereign dominion over the sea adjoining the coasts, and over the arms of the sea; but in him is also vested the *right of property* in the *soil thereof.*"[39]

In short, such ownership is an *"incident of sovereignty."*

Hall, in his essay on *The Rights of the Crown in the Sea-Shores of the Realm,*[40] first published in 1830, emphasized the idea that the Crown's ownership of the beds of inland navigable waters was derived from the Crown's ownership of the sea, saying:

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39 Italics are those of the author.

40 3rd ed., reprinted in Moore, *supra,* pp. 667-892. See quotation from Hall. Brief, pp. 20-21.

> "This dominion not only extends over the open seas, but also over all *creeks, arms of the sea, havens, ports and tiderivers,* as far as the reach of the tide, around the coasts of the kingdom. All waters, in short, which communicate with the sea, and are within the *flux* and *reflux* of its tides, are part and parcel of the sea, itself, and subject, in all respects, to the like ownership."[41]

Woolrych in his *Treatise on the Law of Waters and Sewers,* first published in 1830, based the King's original title to the beds of the sea adjoining the coast and of navigable rivers upon the common law principle that all the soil of the realm was originally vested in the King as lord paramount and universal occupant, and he traced
64 the King's ownership of the foreshore and the beds of navigable rivers to their similarity to the sea within the tidal flow.[42]

Among the other writers who similarly stated the law of the ownership of the bed of the sea and of navigable rivers are Bainbridge in 1841,[43] Jerwood in 1850,[44] Rogers

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41 *Id.* at p. 669. Italics are those of the authqr.

42 Woolrych, Treatise on the Law of Waters and Sewers (1st Am. ed. from 2d London ed., 1853), pp. 47, 52, 394-399.

43 *Bainbridge on Mines and Minerals* (1st ed. London, 1841), see 1st Am. ed., 1871, from 3d London ed., p. 13.

44 Jerwood, James, *A Dissertation on the Rights to the Sea Shores* (London, 1850), pp. 13, 40-41, 43-45.

in 1864,[45] Macswinney in 1884,[46] and Moore in 1888.[47]

Sir Cecil J. B. Hurst, President of the Permanent Court of International Justice, writing in 1923, said:

> "So far as the law of this country is concerned, the rights of the Crown were fixed long before the doctrine of the three-mile limit was thought of, and yet it seems to be agreed that nowadays these property rights do not in general extend beyond the three-mile limit."[48]

The cases and treatises cited above covering the period from 1776 to the present day all proceed on the basis of the same common law rules as those announced by Callis

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45 *Rogers on Mines* (1st ed. London, 1864), see 2d ed., 1876, pp. 178 *et seq.*

46 *Macswinney on Mines* (1st ed. London, 1884), see 5th ed., 1922, p. 33.

47 Moore, Stuart A., *History and Law of the Foreshore and Sea Shore* (1888), p. 653.

48 Hurst, Sir Cecil J. B., "Whose Is the Bed of the Sea?," 4 *British Year Book of International Law,* 1923, p. 34.

65 and Hale in the Seventeenth Century. They indicate no change whatsoever, in the common law after 1776 by which the Crown acquired any rights in the bed of the sea *which it did not have prior to 1776.*

(c) The Dicta in The Queen v. Keyn.

Statements of some of the judges in the case of *The Queen v. Keyn*, L.R. 2 Exch. Div. 63 (1876), are relied upon by the Attorney General as the primary support for his contention that the English Crown in 1776 had no title to the bed of the marginal sea which could be transmitted to the original thirteen States. The statements relied upon not only constituted pure *obiter dictum*, but they are entirely out of line with the earlier and later English authorities cited above. They have, therefore, been reserved for special treatment.

The issue before the court in the *Keyn* case did not require a decision on the territorial limits of England, as plaintiff's counsel admit (Br. p. 47). The sole question there presented was whether the Central Criminal Court of England had jurisdiction to try a *foreigner* for a crime, as defined by English law, which was committed on board a *foreign ship* sailing within three miles of the English coast. The decision was that prior to the statute of 28 Hen. VIII, c. 15, the jurisdiction of the Lord High Admiral did not extend to a crime committed by a foreigner on board a foreign ship, either within or without the limit of three miles from the English coast; that by virtue of that and subsequent statutes, the Central Criminal Court had merely succeeded to the jurisdiction of the Admiral; and hence, *in the absence of a statute* extending its jurisdiction, the Central Criminal Court had no jurisdiction in the case at

66 bar. It is clear that no question of title to submerged lands was involved.[49]

The case was heard before thirteen judges, seven of whom held that there was no jurisdiction and six of whom were of the opinion that jurisdiction existed. Of the seven judges comprising the majority of the court, only five (Cockburn, C.J., Kelly, C.B., Field, J., Pollock, B., and Sir Robert Phillimore) expressed any doubt that the marginal sea, at least to the extent of three miles from the coast, constituted English territorial waters in the sense necessary to give the court jurisdiction without an Act of Parliament.

This doubt was based upon the fact that in England the "body of the counties," to which the jurisdiction of the common law courts was limited, did not extend below low-water mark, and upon the dual meaning of the word "realm" in English law. In this connection Chief Justice Cockburn and (L.R. 2 Exch. Div. at 197-198):

> "To come back to the subject of the realm, I cannot help thinking that some confusion arises from the term 'realm' being used in more than one sense.

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49 The statement in plaintiff's brief (p. 113) that the opinion of Cockburn, C.J. in the *Keyn* case "is perhaps the most exhaustive English judicial opinion *on the question*" is incorrect. The opinion is not "on the question" of ownership of the bed of the sea but of criminal jurisdiction in admiralty over a foreigner. Perhaps the most exhaustive English judicial opinion of the question of the Crown's ownership is that in the case of *Secretary of State for India v. Chelikani Rama Rao, supra.* The most exhaustive judicial opinion on the same question in America is this Court's opinion in *Shively v. Bowlby*, 152 U.S. 1. Yet plaintiff would have this Court disregard these decisions (Br. p. 113); both of which deal with the subject here under consideration, in favor of the overruled *dictum* of the *Keyn* case.

> Sometimes it is used, as in the statute of Richard II, to mean *the land of England*, and the internal sea within it, sometimes as meaning whatever the sover-
67 eignty of the Crown of England extended, or was supposed to extend, over.
>
> "When it is used as synonymous with territory, I take the true meaning of the term 'realm of England' to be *the territory to and over which the common law of England extends* – in other words, all that is within the body of any county – to the exclusion of the high seas, which come under a different jurisdiction only because they are not within any of those territorial divisions, into which, among other things for the administration of the law, the kingdom is parcelled out."[50]

And Chief Justice Cockburn, on whose opinion in the *Keyn* case the Attorney General relies so heavily,[51] readily admitted that Parliamentary legislation extending the criminal jurisdiction to foreigners on foreign ships within the three-mile belt would be binding on the English courts, and succinctly stated the issue before the court as follows (L.R. 2 Exch. Div. at 208):

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50 The same dual meaning of the word "realm" in England was recognized by a former Justice of this Court in *De Lovio v. Boit*, 7 Fed. Cas. 418, Case No. 3776 (Circuit Court, Mass., 1815) where Mr. Justice Story said (p. 427):

> "As to the dictum in 30 Hen. VI. p. 6, respecting the admiralty judges, that 'the place and things of which they hold plea, are *out of the realm,' if it means to speak of the realm in its largest sense, it will include the British seas* (Co. Litt. 259b; 1 Rolle, Abr. 528 l. 13), and is not law; if in a more narrow sense, as including only the bodies of the counties, it will be fully considered hereafter."

51 Plaintiff's Br. pp. 47, 75, 114, 115, 118, 136, 138.

> "The question is whether, acting judicially, we can treat the power of Parliament to legislate as making up for the absence of actual legislation. I am clearly of opinion that we cannot, and that it is only in the instances in which foreigners on the seas have been
68 made specifically liable to our law by statutory enactment that that law can be applied to them."

The majority judges in the *Keyn* case were thus chiefly concerned with the absence of statutory jurisdiction to try a foreigner – a problem obviously unrelated to any question of rights of ownership below low-water mark as between the sovereign and his subjects or as between different political sovereigns within the same territory.

The claim that the *Keyn* case constitutes any authority in support of the plaintiff's theories in the present case, is, it is submitted, predicated on a failure to distinguish between the meaning of the word "jurisdiction" as applied to the *power of a court to enforce existing laws,* and "jurisdiction" as applied to the *power of the sovereign to enact laws* within a certain territory. Jurisdiction in the latter sense is *political jurisdiction* which is synonymous with sovereignty. The majority judges in the *Keyn* case held only that the power of the court to try a foreigner for a crime committed in the three-mile belt outside the body of the English counties could not be conferred by implication, – in other words, that jurisdiction of the court could not exist without legislation. But the power, *i.e.*, political jurisdiction, of Parliament to enact such laws was expressly conceded.

Thus even the majority decision in the *Keyn* case is not inconsistent with the Crown's ownership of the bed of the sea. And none of the factors which troubled the majority in that case exists in the case at bar. In California

the entire three-mile belt is not only within the State's boundaries as defined in the California Constitution but is within the body of the California coastal counties, all of which are described by statute as extending three miles
69 from shore. [Appendix to Answer, pp. 83-86.] Furthermore this Court in *Manchester v. Massachusetts,* 139 U.S. 240, at 263-264 (1891), held that the body of the counties in the States of this Union need not be bounded by low-water mark by reason of the rule of the English common law, but extends to the States' boundaries, which may be lawfully fixed at three miles from shore.[52] Likewise there is definite legislation by which California has conferred upon its judicial and executive officers complete jurisdiction and power over the three-mile belt.

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52 In *Manchester v. Massachusetts,* Mr. Justice Blatchford said (139 U.S. at 263-264):

> "It is also contended that the jurisdiction of a State as between it and the United States must be confined to the body of counties; that counties must be defined according to the customary English usage at the time of the adoption of the Constitution of the United States; that by this usage counties were bounded by the margin of the open sea; and that, as to bays and arms of the sea extending into the land, only such or such parts were included in counties as were so narrow that objects could be distinctly seen from one shore to the other by the naked eye. But there is no indication that the customary law of England in regard to the boundaries of counties was adopted by the Constitution of the United States as a measure to determine the territorial jurisdiction of the States. The extent of the territorial jurisdiction of Massachusetts over the sea adjacent to its coast is that of an independent nation; and, except so far as any right of control over this territory has been granted to the United States, this control remains with the State."

The lack of criminal jurisdiction over foreigners within the three-mile limit, which was held to exist in *The Queen v. Keyn,* was quickly supplied by Parliament through the passage of the Territorial Waters Jurisdiction Act, 1878,
70 41 and 42 Vict. c. 73.[53] That Act stated in its preamble:

> "Whereas the rightful jurisdiction of Her Majesty, her heirs and successors, extends *and has always extended* over the open seas adjacent to the coasts of the United Kingdom and of all parts of Her Majesty's dominions to such a distance as is necessary for the defense and security of such dominions * * * "

and it was thereby enacted that an offense, committed by any person, whether or not a British subject, on the open sea within British territorial waters was an offense within the jurisdiction of the Admiral, although committed on board or by means of a foreign ship. The act defined

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53 As a result of the decision in *The Queen v. Keyn,* the Lord Chancellor (Lord Cairns) in February 1878 presented a bill in the House of Lords which was passed as the Territorial Waters Jurisdiction Act, 1878, 41 and 42 Vict. c. 73, stating that he understood the common ground on which the majority of the judges acted in quashing the conviction in the *Keyn* case to be that the jurisdiction of the Lord High Admiral extended to the high seas, but that the persons over whom it was exercised must be British subjects and not foreigners, and that the Central Criminal Court had merely succeeded to the jurisdiction of the Admiral. Lord Cairns also pointed out that the Dover Port Authorities had, pursuant to Parliamentary authority, defined the port as extending three miles from shore and including the place of the offense in the *Keyn* case *prior to its commission,* but that through some unbelievable piece of inadvertence this fact nad not been called to the attention of the judges. If it had been brought to their knowledge, he said, the decision would have been the other way. See Halleck, *International Law,* 4th ed., London, 1908 (as reprinted in Crocker, *The Extent of the Marginal Sea* (1919), p. 98).

territorial waters in reference to the sea as meaning such part of the sea adjacent to the coast as is deemed by international law to be within the territorial sovereignty of the Crown, and provided that for purposes of the Act it included "any part of the open sea within one marine
71 league of the coast measured from low-water mark."[54]

John Bassett Moore said of this Parliamentary action:

> " * * * the government and Parliament of Great Britain, after the decision in *Queen v. Keyn,* considered it imperative to adopt legislation nullifying its effect for the future, besides declaring it wrong as to the past."[55]

The gratuitous statements of Chief Justice Cockburn and some of his colleagues in *The Queen v. Keyn* were placed in their proper perspective, as respects the question of ownership of submerged lands, in the decision of

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54 Despite this legislation, the dicta contained in the majority opinions in *The Queen v. Keyn* continued to have some influence, at least in the decision of the Privy Council in *Attorney-General for British Columbia v. Attorney-General for Canada,* [1914] A.C. 153 (see Plaintiff's Br., pp. 48-50). The Privy Council stated in that case that no decision was required on the question of whether the Crown had a right of property in the bed of the sea below low-water mark, and the statements in the opinion upon which plaintiff relies were therefore pure dicta. It is of interest, however, that the Privy Council did say in that case, in answer to one of the questions certified to it from the Supreme Court of Canada, that there was no difference between the open sea within a marine league of the coast on the one hand, and arms of the sea and estuaries on the other, so far as concerned the public right of fishing, thus reaffirming and applying the common law doctrine under which the sea and arms of the sea were and are treated alike.

55 *The Collected Papers of John Bassett Moore,* vol. VII, p. 294.

the Privy Council in *Secretary of State for India v. Chelikani Rama Rao*, 43 L.R. Ind. App. 192 (1916). That case has heretofore been referred to (pp. 51-53) as holding squarely that islands formed on the bed of the sea within three miles of the coast of India belonged in property to the British Crown, a decision which was grounded squarely upon the authority of Lord Hale and of common law
72 cases dealing with ownership of submerged lands. Speaking for the Privy Council, Lord Shaw of Dunfermline said of *The Queen v. Keyn* (pp. 199-200):

> "The doubt raised upon this proposition has been substantially rested on certain dicta pronounced in the case of *Reg. v. Keyn*. (2 Ex. D., 63). The Crown, admitted to be owner of the foreshore, is, so it was there suggested, bounded in its dominion of the bed of the sea by the range of the rise or fall of the tide. Crown property does not, it was said, extend further seaward. *It should not be forgotten that that case had reference on its merits solely to the point as to the limits of Admiralty jurisdiction; nothing else fell to be there decided.* It was marked by an extreme conflict of judicial opinion, and the judgment of the majority of the Court was rested on the ground of there having been no jurisdiction in former times in the Admiral to try offences by foreigners on board foreign ships whether within or without the limit of three miles from the shore.
>
> *"When, however, the actual question as to the dominion of the bed of the sea within a limited distance from our shores has been actually in issue, the doubt just mentioned has not been supported nor has the suggestion appeared to be helpful or sound.* Their Lordships do not refer to the settlement of the rights of the Crown as against the Duchy of Cornwall in the Cornwall case – but to much more recent examples of contested rights in or over land *ex adverso* of the foreshore."

After referring to and quoting from *Lord Fitzhardinge v. Purcell, supra*, and *Lord Advocate v. Clyde Navigation Trustees, supra*, Lord Shaw quoted as follows from the
73 opinion of Lord Watson in *Lord Advocate v. Weymss* (p. 201):

> "I see no reason to doubt that by the law of Scotland the solum underneath the waters of the ocean, whether within the narrow seas, or from the coast outward to the three mile limit, and also the minerals beneath it are vested in the Crown."

And Lord Shaw continued (p. 201-202):

> "In the opinion of the Board, this is also the law of India. The Crown is the owner and the owner in property, of islands arising in the sea within the territorial limits of the Indian Empire."

Some years before the Privy Council's decision in the *Secretary of State for India* case, this Court expressed a similar view as to the weight to be given the decision in *The Queen v. Keyn*. In *Manchester v. Massachusetts*, 139 U.S. 240 (1891), Mr. Justice Blatchford said of that case (p. 257):

> " * * * there [in *The Queen v. Keyn*] the question was not as to the extent of the dominion of Great Britain over the open sea adjacent to the coast, but only as to the extent of the existing jurisdiction of the Court of Admiralty in England over offenses committed on the open sea; and the decision had nothing to do with the right of control over fisheries in the open sea or in bays or arms of the sea. In all the

cases cited in the opinions delivered in *Reg. v. Keyn*, wherever the question of the right of fishery is referred to, it is conceded that the control of fisheries, to the extent of at least a marine league from the shore, belongs to the nation on whose coast the fisheries are prosecuted."

(d) SUMMARY.

74 The foregoing review of English common law authorities from 1569 to the present time conclusively shows:

1. That whenever the question as to the dominion or ownership of the bed of the sea within a limited distance from the open coast of England and its colonies has been in issue, the answer given by the English common law courts has invariably been that the ownership of the sea bed is in the British Crown, subject only to the public rights of navigation and fishing.

2. That there has been no change in the English common law on this subject since 1776 or 1789, all the cases having relied upon the principles laid down by Lord Hale in the Seventeenth Century.

3. That no distinction whatever has been made between the Crown's ownership of the sea bed off the open coast on the one hand and the Crown's ownership of the foreshore and the beds of so-called inland navigable waters to the extent of the flow of the tide on the other, the Crown's title in each case being subject to the public rights of navigation and fishing.

4. That the development of the three mile limit in international law has in no sense served as a basis for the emergence of any new rights of the Crown in the sea

bed which it did not enjoy in and prior to 1776, and that the only and utmost effect of that doctrine has been to place a seaward boundary upon the extent of sea bed owned by the Crown.

5. That the plaintiff's contention that the English Crown in 1776 and 1789 had no title to the bed of the sea off the open coast, which could be transferred to the original thirteen States, is based solely upon doubts expressed a century later by a few English judges in *obiter dicta* which have subsequently been unequivocally overruled and repudiated both by Parliament and by the Courts.

* * *

II.

Original States Both in Colonial Times and Since Statehood Have Always Maintained Their Ownership of the Marginal Seas.

86

(a) Massachusetts

* * *

(ii) *Colonial Legislation.*

By early legislation the Plymouth and Massachusetts Bay Colonies exercised rights of ownership, control and government in portions of the adjoining sea. For example, as early as 1652 the Plymouth General Court enacted a statute providing that:

"... if any man take a drift whale of att the sea and bring or tow it to the shore, it [shall] be accounted his owne goods; but *if within a harbour or mile of the shore* they be taken they be reputed the townships where they are brought on shore."[17]

17 *Plymouth Colony Laws*, Part I, 96-97.

Again, in 1671, it was enacted by the same body that:

> ". . . all such Whales as are cast up within the Bounds of any particular Township, or floating upon the stream, *within a Mile of the Shoar*, against the said Bounds of any Township, shall be accounted the respective Towns falling within their Bounds as aforesaid . . . "[18]

87 In 1684 an act was passed by the Plymouth General Court relating to the catching of mackerel with seines

> "att Cape Codd or else where near any shore in this Colonie, . . . "[19]

Other statutes were enacted by the colonial legislatures of Plymouth and Massachusetts Bay Colonies affecting the territorial waters of these colonies.[20]

(iii) *County and Town Coastal Boundaries.*

In 1760 the Legislature of the Province of Massachusetts Bay fixed the coastal boundary of Cumberland County (now a part of the State of Maine) as limited

> "on the Southeast *by the Sea* or Western Ocean . . . *including all the Islands* on the Sea Coast of the said new County,"

and defined the coastal boundary of Lincoln County (now also a part of the State of Maine) as limited

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18 Part III, *idem.*, 282 (*Revised Laws*, 1671, c. XI, §2).

19 *Plymouth Colony Laws* (Brigham), Part II, p. 205.

20 *Plymouth Colony Laws* (Brigham), Part II, pp. 282, 283-4 Rev. Laws 1671, c. X, Sections 3, 4.
Massachusetts Province Laws 1692-3, Chapter 32, Act of November 26, 1692, Sections 1, 2.
Massachusetts Province Laws 1702, Chapter 12, Act of November 21, 1702.

> "on the South and Southeast *by the Sea* or Western Ocean; and on the North by the utmost Northern Limits of this Province; *including all the Islands* to the Eastward of the County of Cumberland aforesaid."[21]

88 In 1789 the General Court of the Commonwealth of Massachusetts fixed the boundary of Washington County (now a part of the State of Maine) as bounded

> "on the south and southeast *by the sea* or western ocean, on the north by the utmost northern limits of this Commonwealth, . . . *including all the islands* on the seacoast . . . "[22]

Until 1820 the State of Maine was a District of Massachusetts. The coastal counties of the State of Maine established by the Massachusetts Legislature in 1760 and 1789, were redrafted by the Maine Legislature in 1916 to provide that:

> ". . . the lines of the several counties which terminate at or in tide waters shall . . . include . . . the several islands in said waters, and after so including such islands shall run in the shortest and most direct line *to the extreme limit of the waters under the jurisdiction of this State;* and all waters between such lines off the shores of the respective counties shall be a part of and held to be within such counties."[23]

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21 *1760 Acts and Laws of Massachusetts*, Chap. II, pp. 523-526. Plaintiff's Brief, p. 94.

22 *Massachusetts Laws* (1789), page 27. Plaintiff's Brief, page 94.

23 *Maine Rev. Stat. 1916*, Chapter 133, Section 3, page 1514. *Maine Rev. Stat. 1930*, Chapter 143, Section 3, page 1640.

92 (ii) *Colonial Statutes:*

In 1736 the [Rhode Island] Colonial Legislature passed an act prohibiting the use of seines in catching fish

> *"within the Extent of half a Mile distance from Point Judith Breach, in the sea, nor . . .* within the Extent of *half a Mile* of each side of the Entrance of said Petaquamscut River *in the sea. . . .* "[33]

This statute was reenacted in 1798 and is found in the 1938 General Laws of Rhode Island.[34]

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33 Rhode Island Acts and Laws 1730-1736 (James Franklin's Edition), page 277, adopted June 2, 1736.

34 The Public Laws of the State of Rhode Island and Providence Plantations, 1798 (Carter and Wilkinson, 1798 Ed.), page 496; General Laws of Rhode Island (1938), Title XXIV, page 242, Sec. 12.

* * *

98 (ii) *Colonial Legislation:*

In 1726 the [New York] Colonial Legislature passed an act granting one Lovis de Langloiserie exclusive fishery of porpoises for a term of ten years

> "in the *seas,* harbors, rivers and other waters *within this colony.*"[50]

Legislation governing the maritime territory of this colony was enacted as, for example, the Act of May 10, 1699, for

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50 II Colonial Laws of New York, pages 311-312.

> "securing his Majesty's and his Subjects' just Rights to all Drift-Whales, and other royal Fishes that shall be cast to the Shore *or found floating on the Coasts of this Province.*"[51]

and the "Act for Preserving Oysters" passed in May, 1715.[52]

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51 I Colonial Laws of New York, page 409.

52 I Colonial Laws of New York, page 845.
Other acts for preservation of oysters were passed in December, 1737 – II Colonial Laws of New York, page 1067; October 17, 1730 – II Colonial Laws of New York, page 655.

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U.S. Ex. No. 11

Brief of National Association of Attorneys General, Amicus Curiae

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49 A second category of State acts based on ownership of submerged lands under coastal waters is found in the statutes relating to the regulation or leasing of fisheries, oyster beds and other marine life or resources. Thus New Jersey early forbade non-residents to take clams or oysters in any of the rivers, bays or waters of the State (Act of December 10, 1825 – Comp. Laws (1833) 124), and Rhode Island had a similar regulation against taking shellfish within the waters or on the shores of this State (Dig. 1844, p. 533, §6; see *State v. Medbury*, 3 R.I. 138–1855).

It has been impossible to assemble all the fishing laws of the States, but it is clear that control of fisheries in

the open sea continued to be a matter of concern to the States. Mississippi granted to the upland owners the exclusive right to plant oysters in the waters of the Gulf of
50 Mexico in front of their lands (1886 Miss. Laws, p. 180; Apdx. to Answ., p. 614); Louisiana by a series of acts beginning in 1886[54] declared its title to all oyster beds underlying the navigable waters of the Gulf of Mexico within its territorial limits, and provided for leases thereof to individuals upon the payment of specified rentals to the State; Virginia claimed ownership of oyster-beds "whether the said bed * * * shall ebb bare or not" (Va. Code 1887, §1338); Georgia gave to upland owners the exclusive rights to oysters and clams in the tide waters of the State, which were defined to include waters below low tide (1902 Ga. Laws, p. 108; Apdx. to Answ., pp. 648-49), but forbade the use of dredges within 1000 feet of ordinary mean tide (1905 Laws 73; Apdx. to Answ., p. 650); Rhode Island authorized State leases for oyster culture of land "covered by four feet of tidewater at mean low tide" (General Laws 1909, c. 203; Apdx. to Answ., p. 706); the New York Conservation Law fixed the marine district as including "all tidal waters within three nautical miles of the State coast" (L. 1912, c. 318); Oregon has authorized the State Land Board to lease land between low tide and three miles seaward therefrom for the harvesting of kelp and other seaweed (1917 Laws of Ore., c. 276, p. 516, Apdx. to Answ., p. 586); Texas has asserted its ownership of the bed of the Gulf of Mexico within its jurisdiction and vested the Game, Fish and Oyster Commission with control of fishing therein (Acts 1925, p. 438; Rev. Civ. Stat. [1936] Art. 4026); New Jersey has

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54 Acts 106 of 1886, 121 of 1896 and 159 of 1900 (Apdx. to Answ., p. 604).

exercised jurisdiction over fishing in its Atlantic Waters (23 N.J.S.A. §§5-241, 5-24.2(e), 3-43); and Washington provided for leases of oyster beds lying below extreme low tide under navigable waters (Act 255 of 1927, Sec. 142, Apdx. to Answ., p. 557).

The long continuous nature of this jurisdiction is illustrated by New Jersey's current Shellfish Law, and espe-
51 cially Chapter 4, "Regulations applicable to Atlantic Coast." The imposition of a seasonal restriction on oyster gathering (N.J.S.A. §50:4-1) and the exclusion of non-residents (§50:4-2 and §§50:2-1, 50:2-2) go back to the colonial regulations of 1718 (1 Nevill 86, *supra*, p. 18), while the restriction on the use of dredges, etc. (§50:4-2) goes back at least to the prohibition in the New Jersey Act of June 9, 1820, §II (1838 Digest N.J. Laws, p. 372).

In addition to the statutes cited above, there are numerous State decisions upholding State regulation of fisheries in the coastal waters. For instance, in *Bosarge v. State*, 23 Ala. App. 18, 121, So. 427 (1928), cert. den., 219 Ala. 154, 121 So. 428 (1929), cert. den., 280 U.S. 568, (1929), the Alabama Court, in reliance on this Court's holding in *Manchester v. Massachusetts*, 139 U.S. 240, previously referred to at pp. 18, 28-29, 45, *supra*), held that an Alabama statute regulating the trolling for shrimp could be applied at a point within the Gulf of Mexico three-fourths of a mile beyond the beach of one of the outermost islands and that such point was within the "territorial jurisdiction" of the State of Alabama.

In the early case of *Dunham v. Lamphere*, 3 Gray 268 (Mass. 1855), Chief Justice Shaw sustained a Massachusetts statute forbidding the use of seines within one mile of the shores of Nantucket Island and Gravel Island.

In *Lipscomb v. Gialourakis,* 101 Fla. 1130, 133 So. 104 (1931), the Florida Court upheld a conviction for using diving apparatus to take commercial sponges from the Gulf of Mexico within the territorial limits of Florida.

Other State cases dealing with fishing regulations and other questions of ownership of submerged coastal lands are listed in the footnote.[55]

52 A third category of State acts in the coastal sea relates to express grants of land under water or rights to extract products therefrom. An example of the exercise of such jurisdiction in coastal waters is a New Jersey statute entitled: "An act to authorize the owners of land upon tidewaters to build wharves in front of the same", which authorized "the owners of lands situated along and upon tidewaters to build docks or wharf on the shore in front

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55 *Ocean Industries, Inc. v. Superior Court,* 200 Cal. 235, 252 Pac. 722 (1927) (enforcing regulation against sardine reduction plant on ship anchored off shore); *State v. Ruvido,* 137 Me. 102 (1940) (fishing regulation within three-mile limit); *Burnham v. Webster,* 5 Mass. 266 (1809) (penalty for taking bass in the sea near mouth of river); *Dill v. Inhabitants of Wareham,* 7 Mete. (48 Mass.) 438 (1844) (King's ownership of fisheries passed to colonies); *Commonwealth v. Boston Terminal Co.,* 185 Mass. 281, 282 (1904) (State has title to land within one league of shore); *State v. Stewart,* 184 Miss. 202, 184 So. 44 (1938) (removal of sand from bed of a tidal inlet); *Simpson v. Moorhead,* 65 N.J. Eq. 623 (1904) (holding that State owns tidal meadows below high water mark); *State v. Brown,* 3 Dutcher (27 N.J.L.) 13 (1858) (right to build wharf beyond low water mark); *State v. Kofines,* 33 R.I. 211 (1911) (license for lobster fishing); *Narragansett Real Estate Co. v. Mackenzie,* 34 R.I. 103 (1912) (holding that State has title to the bed of the Ocean); *State ex. rel. Luketa v. Pollock,* 136 Wash. 25, 239 Pac. 8 (1925) (permitting enforcement of State fishing regulations within three-mile limit).

of his lands beyond the limits of ordinary low water * * *" subject to license and to the preservation of public navigation (N.J. Laws 1851, p. 335).[56]

The right-of-way of the Florida East Coast Railway was largely on submerged lands granted by the State of Florida (Apdx. to Answ., pp. 641-45).

The New York Land Office, acting under long standing statutory authority, gave a grant of land under water in 1897 extending 1500 feet from mean high water line into the Atlantic Ocean (see *People v. Steeplechase Park Co.,* 218 N.Y. 459, 113 N.E. 521–1916). The right to make
53 similar grants is one of the basic assumptions in New York's recent anti-erosion statute, permitting grants to municipalities of State owned land under water along the Atlantic Ocean, for the construction of jetties and other works to arrest erosion (N.Y. Laws 1945, c. 535).

Among other examples, Pennsylvania has authorized the Water and Power Resources Board to permit the dredging of sand and gravel from the bed of Lake Erie (Act of June 25, 1913; Apdx. to Answ., p. 687), and Ohio has authorized municipalities to lease land under water in Lake Erie for docks and wharves (Apdx. to Answ., p. 725).

Texas, beginning as early as 1913, authorized the Commissioners of the General Land Office to lease that portion of the Gulf of Mexico within its jurisdiction, for the production of oil and gas (1913 Texas Laws, p. 409; Apdx. to Answ., pp. 595-96). Act 30, Extra Session of the Legislature of Louisiana of 1915, and subsequent acts, authorized

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56 *Cf. Freed v. Miami Beach Pier Corp.,* 93 Fla. 888, 112 So. 841 (1927) (right of littoral owner to build wharf on soil of marine belt, owned by State).

the execution of oil, gas and mineral leases covering State-owned lands, including submerged lands. (See also Apdx. to Answ., pp. 608-10.)

Grants of submerged lands in bays and harbors by the various States are too numerous to recite, but the States' ownership of such lands is based on the same principle as their ownership of lands under coastal waters. The Government recognizes the unity of the principle, and also that reliance on ownership of so-called inland waters has been of too great proportion to permit any suggestion of change (Br., p. 143).

Reference should also be made to the State cases dealing generally with the territorial limits of the States. A typical example is *Commonwealth v. Manchester*, 152 Mass. 230 (1890), wherein the Court upheld the statutory definition of the territorial limits of Massachusetts as extending "one marine league from its seashore at low-water mark." (Aff'd, 139 U.S. 240, *supra*, p. 28.)

54 In speaking for the Massachusetts Court, Field, *C.J.*, made the terse statement of the principle of law (p. 241):

> 'There is no belt of land under the sea adjacent to the coast which is the property of the United States and not the property of the States."

In all of the above cases the Courts based the powers of the States to regulate on the *ownership* by the States of the soils beneath their territorial waters.

These many State acts and decisions recognizing State title to submerged lands furnish strong additional reason for adhering to the rule, even apart from the decisions of this Court mentioned in Point II. As this Court said in *Best v. Polk*, 18 Wall. 112, 117 (1873), with respect to claims of title based on United States treaty with Indians:

> " * * * These decisions, furnishing a rule of property on this subject in Mississippi, were not brought to this court for review, as they could have been, but have been acquiesced in for a quarter of a century. To disturb them now would unsettle titles *bona fide* acquired."

B. Federal acceptance of grants from the States.

The repeated rulings and declarations of this Court sustaining and emphasizing the States' ownership of all lands under tidal waters within their boundaries have always been accepted and acted upon by the other branches of the Federal Government. The rule has thus been treated as a settled one. Whenever the Federal Government has required sites under coastal waters for defense or navigation, it has obtained them from the States by cession, by purchase, or by condemnation proceedings.

For instance, when the Federal Government built jetties in the Ocean, it has frequently obtained grants from the
55 States covering the land on which the jetties were built. Such grants were obtained in 1899 from South Carolina, covering a jetty extending 500 feet into the Atlantic Ocean (Apdx. to Answ., p. 653); from Florida in 1938, for a jetty at the mouth of the St. Johns River extending 2 miles into the Atlantic Ocean (Apdx. to Answ., p. 1931); and from Texas in 1912, for a strip extending 2 miles into the Gulf of Mexico from the City of Galveston (Apdx. to Answ., p. 592).[57]

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[57] In the absence of such a grant, the jetty remains within State jurisdiction. *Winston Bros. Co. v. Galloway*, 168 Ore. 109, 121 P. (2d) 457 (1940) (sustaining State tax on profits from work done on jetty beyond low-water mark).

Other grants of land under water, below low-water mark, are set forth in the Appendix to California's Answer. See, for instance, the Acts of Mississippi in 1858 (Apdx. to Answ., p. 612); Delaware in 1871, 1873 and 1899 (Apdx. to Answ., pp. 681-84); South Carolina in 1896 and 1900 (pp. 654 to 656); Washington in 1909 (pp. 543-44); Virginia in 1922 (p. 667); and Florida in 1939 (Apdx. to Answ., p. 639). The foregoing list does not include the more numerous grants in bays and harbors, such as Alabama's 1919 grant of 12 acres of submerged land in Mobile Bay (Apdx. to Answ., pp. 618-19), although we have seen that the same rule sustains State title to submerged lands in bays as applies in coastal waters.

Special mention should be made of lighthouse sites, for the Federal Government has always recognized that these must be obtained from the States. The Federal statute provides (33 U.S.C.A., §727):

> "No lighthouse, beacon, public piers, or landmark, shall be built or erected on any site until cession of jurisdiction over the same has been made to the United States."

56 The States and the United States have acted on the principle set forth in this statute, that deeds from a State are necessary for lighthouse sites, whether they be above or below low-water mark. The Legislature of Maine in 1887 made a grant of lands under water in Quoddy Roads (Apdx. to Answ., p. 719); New York in 1874 ceded jurisdiction over a number of sites in New York Harbor and Long Island Sound (Apdx. to Answ., pp. 692-96); and general statutes have been enacted by Alabama in 1875 (Apdx. to Answ., pp. 617-18), Maryland in 1874 (Apdx. to Answ., pp. 671-72); Massachusetts in 1880 (Apdx. to

Answ., pp. 709-10), Michigan in 1874 (Apdx. to Answ., p. 734), Ohio in 1875 (Apdx. to Answ., p. 726), South Carolina in 1874 (Apdx. to Answ., p. 658), and Virginia in 1874 and later (Apdx. to Answ., pp. 664-65).

Similarly, grants have been obtained covering lands under water required by the Federal Government for forts.[58]

The Government attempts to belittle these grants by eliminating all those in harbors or bays, eliminating the Great Lakes as inland waters and then finding some excuse for each of those which it admits covered coastal waters. We have shown earlier in this brief (Point II C, *supra*) that bays and the Great Lakes are all subject to the same rules as coastal waters. Even apart from that, the fact remains that the United States has repeatedly accepted State deeds, made upon the assumption that the State held title to land under coastal waters, and that the Government has been unable to point to a single claim of Federal ownership prior to Mr. Ickes' reversal of his own earlier position in 1937.

The Federal Government, through its various agencies, has recognized the State ownership of these submerged
57 lands, not simply by requesting and accepting deeds from the States, but by other affirmative rulings.

The Attorney General has been required to pass on the validity of the title of the State in each instance where a deed was received (R.S. §355; 40 U.S.C.A. § 255). An illustration is the opinion of the Attorney General of the United States affirming Washington's title to tidelands and waters in the Pacific Ocean, surrounding the

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[58] South Carolina Act of 1896 (Apdx. to Answ., pp. 654-55); California statutes of 1897 and later (Apdx. to Answ., pp. 91 to 116).

Fort Canby Military Reservation, rendered March 20, 1925 (34 Op. A.G. 428; Apdx. to Answ., pp. 545-46).

The Commissioner of the United States General Land Office, in 1910, in rejecting an application for submerged lands east of Key West, Florida, ruled that title thereto belonged to the State by its right of sovereignty (Apdx. to Answ., p. 637). Other rulings relating to submerged lands in Washington (13 L.D. 299, Apdx. to Answ., p. 565) and Texas (Navy Dept. Report of 1917, Apdx. to Answ., pp. 596-602) and lands in Lake Ontario within the State of New York (7 Op. A.G. 314; Apdx. to Answ., p. 699) and in Lake Michigan within the State of Illinois (8 Op. A.G. 172; Apdx. to Answ., p. 728) and within the State of Wisconsin (House Doc. 804, 66th Cong., 2d Sess.; Apdx. to Answ., p. 737), likewise recognize State title thereto.[59]

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59 A similar principle is applied in Alaska, where submerged lands in the Behring Sea were deemed reserved from grant to be left to the disposition of the new State when organized (29 L.D. 395, Apdx. to Answ., pp. 531, 534).

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U.S. Ex. No. 72

Order In Council Relative To Encroachments On The Grant To The New England Company, September 28, 1621, E.B. O'Callaghan, ed., III *Documents Relative To The Colonial History Of The State of New York* (Albany, 1853)

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5 *Order in Council relative to encroachments on the grant to the New England Company.*

[Council Register, Jac. I., R. V. 143]

At Hampton Court the 28th September 1621.

PRESENT.— Lo. Archbishop of Canterburie,

Lo. Keeper	Lo. Brooke
Lo. Treasurer	Lo. Cranfield
Lo. Stewarde	Mr. Secy Calvert
E. Marshall	Mr. of the Roles
Lo. Vic. Falkland	Sir Rich. Weston.
Lo. Bp. Winton	

A Letter to the Mayors of Bristoll Exon. Plymouth, Dartmouth. Barnstable. and Waymouth, and to each of them. and to all Merchants. owners of Shipps and other His Majesties subjects to whom it shall or may appertaine.

WHEREAS wee have been informed on the behalfe of the President and Councill of New England, that although they by their ordinances established by the authoritie of his Majesties letters patents have freely given way to divers Marchants or others to become Adventurers with them in their trade and Plantation in those parts, soe as they submitt themselves to such convenient orders as shall be sett downe for the advancement of that plantation, and more

regular and free increase of Publick Trade, notwithstanding there are some what have alreadie attempted, and are in further preparation to assume a libertie to themselves to trade to the prejudice of the said Plantation, without resort to the said Government or orders established for the publick good, Which, if it should bee tollerated in them, would not only bee a prejudice to the Plantation adventurers, who by their industrie have discovered those remoate places, and with the hazard of the lives of their people and expense of their Estates have layd the first foundation of soe honorable an enterprise, but would alsoe bringe a confusion to the said Plantation and an overthrowe untoe that Trade, and bee likewise an utter discouragement to all future endeavours of the like kinds. Wee have therefore thought fitt hereby to lett you knowe and doe require you to signifie as much unto such of his Majesties subjects inhabitinge neere unto that Coast whom the same may concerne, That if anie person shall presume to attempt, or doe anie thing in that behalfe contrary to his Majesties said Graunt, hee is to expect noe less than the due execution thereof, and such further punishment as is fitt to be inflicted upon those that shall contemne his Majesties Royall authoritie. Neverthelesse it is hereby intended and soe ordered, that the agreement made by order of this Board betweene them of New England and Virginia shall in all respects be duly observed by either partie. And soe &c. &c.

U.S. Ex. No. 73

"Minutes of the First Division of the Great Patent of New England by the Great Council for New England, June 24, 1622," M.F. Farnham, ed., VII *Documentary History of the State of Maine* (Maine Historical Society, *Collections*, 2d series I-XXIV [Portland, 1869-1916])

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X.

MINUTES OF THE FIRST DIVISION OF THE GREAT PATENT FOR NEW ENGLAND BY THE GREAT COUNCIL FOR NEW ENGLAND.

JUNE 24,
JULY 4, 1622.

* * *

Minutes of the Council of New England Wednesday ye 24th of July 1622. The Earle of Arundell. Sr. Ferd: Gorges. Mr. Secretary Calvert. Sr. Sam Argall.

It is ordered and agreed that the Lord Duke of Lenox have for his devident and part of the Mayne Land of New
62 England in America, from ye middle of Sawahquatock towards Sagadahoc, and his bounds that way to reach mid way betweene Sawahquatock and Sagadahoc upon ye Coast. And to reach 30 miles backward into ye Mayne. And 3 Leagues into ye sea.

Mr. Secretary Calvert to begin his devident ye middle of Sagadahoc and to goe close to ye Lord Duke his bounds. And to have further into his devident the Island called by ye name of Setquin.

The Earle of Arundele to have for his devident from ye middle of Sagadahoc, and to goe northeast soe much on his side, as Mr. Secretary goes on ye other side upon ye Coast. And to reach miles backward into ye Mayne, and 3 leagues into ye Sea. And to have furter into his Devident ye Iland called Menehigan.

It is propounded that ye Tenure in ye grand pattent is thought meet to bee held of ye Crowne of England by ye sword.

And that private Planters shall hold of the Chamber of State to bee established there, and shall have power to create their owner Tenures to such as shall hold under them.

The Country to be called Nova Albion. That there may bee power given in the grand pattent to create Titles of Honour and precedency soe as ye differ in nominacon from the titles used heere in England.

Mr. Rattcliffe is sent for by a Messinger of the Chamber to attend Earle of Arundell, tomorrow by two of ye
63 clock, touching Timber stayd by his appointment in ye woods at Whiteby.

It is thought meet that the two great Islands lying in ye river of Sagadahoc bee reserved for the publike plantacon.

Further that a place bee reserved betweene the branches of the two rivers for a publike Citty.

Mr. Thompson is appointed to attend the Lords for a Warrant to Mr. Attorney generall for drawing ye new Pattents, and Sr. Henry Spilman is desired to attend Mr. Attorney thereabouts.

The Lord Dukes and ye Earle of Arundells devidents, sett down by Sr. Ferd: Gorges upon view of ye mapps.

The Lord Duke of Lenox is to have for a part of his Devident of ye lands in New England, from the midst of the river called Sawahquatock 15 English Miles in a straight line upon the sea coast, to ye Eastward of ye River. And 30 English miles backward of all the breadth afore-sd upp into the Mayne Land, North or North and by west. as ye Coast and River of Sawahquatock lyeth. accounting 1760 yards to every mile, with all ye fishings. Bayes, Havens, Harbours and Islands lyeing or being within 9 miles directly into ye sea (Excepting such Island, as are allready granted etc. All lyeing betweene the degrees of 43 and 44 etc.)

The Earl of Arundell to have for a part of his devident from ye Southermost poynt of Pethippscott East 12 Miles
64 in a straight lyne as the coast lyeth on ye sea shoare. And 30 miles by all that breadth upp into the Mane Land due North, acounting 1760 yards to every mile, with all ye Fishings, Havens, Islands, etc. Lying and being within 9 miles directly into the sea, etc. Together with ye Islands of Menehiggan etc. All lyeing betweene the Degrees of 43 & 44.

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U.S. Ex. No. 334

Conference between Gerard de Rayneval, French Under Secretary of Foreign Affairs and the Earl of Shelburne, British Prime Minister, September 18, 1782; Correspondence Politique, Angleterre, lib. 358: 172-192 Ministere des Affaires Estrangeres, Paris.

* * *

7 Finally there came the turn of America, Mylord Shelburne foresaw that they would have many difficulties with the Americans, as much with regard to boundaries as to the Newfoundland fisheries, but he hopes the King will not support them in their demands. I replied that I did not doubt the King's eagerness to do what shall rest with him to keep the Americans within the bounds of justice and reason; and, mylord having desired to know what I thought of their claims, I answered that I did not know what they were with respect to the fisheries, but that whatever they might be it seemed to me that there was one safe principle to be followed in this matter, that is, that fishing on the high seas is *res nullius* whereas coastal fishing belongs by right to the proprietor of the coasts,
9 in the absence of derogations based on conventions. As to the extent of the boundaries, I supposed that the Americans would draw it from their charters, that is to say, they will want to extend from the Ocean to the South Sea. . . .

* * *